Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

DEL MONTE FRESH PRODUCE COMPANY ET AL.,
PETITIONERS

v.

ANGEL ENRIQUE VILLEDA ALDANA, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an aggravated armed assault -- lasting no more than eight hours -- during which the Plaintiffs were verbally abused and threatened with death at gunpoint, but were not physically abused and suffered no bodily injuries, constitutes "severe" and "prolonged" "torture" under the Alien Tort Statute, 28 U.S.C. § 1350 and the Torture Victim Protection Act, 28 U.S.C. § 1350, note, sufficient to permit federal subject matter jurisdiction.

2. Whether the Opinion rendered below by the United States Court of Appeals for the Eleventh Circuit incorrectly found the existence of subject matter jurisdiction over Plaintiffs' claims of "mental torture" under the Alien Tort Statute, 28 U.S.C. § 1350 and the Torture Victim Protection Act, 28 U.S.C. § 1350, note.

3. Whether the Opinion rendered below by the United States Court of Appeals for the Eleventh Circuit conflicts with this Court's recent opinion in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) and with *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 92 (D.C. Cir. 2002) and *Simpson v. Socialist People's Libyan Arab Jamahiriya*, 326 F.3d 230 (D.C. Cir. 2003) on the threshold question of a District Court's subject matter jurisdiction to hear claims of torture under the Alien Tort Statute, 28 U.S.C. § 1350 and the Torture Victim Protection Act, 28 U.S.C. § 1350, note.

PARTIES TO THIS PROCEEDING

FRESH DEL MONTE PRODUCE INC., DEL MONTE FRESH PRODUCE COMPANY, and COMPAÑÍA DE DESARROLLO DE GUATEMALA, S.A., PETITIONERS

ANGEL ENRIQUE VILLEDA ALDANA, OSCAR LEONEL GUERRA EVANS, RIGOBERTO ALVAYERO HERNANDEZ, GUMERZINDO LOYO MARTINEZ, MAREL MARTINEZ, LYIONHEL MCINTOSCH RODRIGUEZ, and JORGE AGUSTIN PALMA ROMERO, RESPONDENTS

CORPORATE DISCLOSURE STATEMENT

Petitioners:

Fresh Del Monte Produce Inc. is a publicly traded company listed on the New York Stock Exchange and is the indirect shareholder of Petitioner, Del Monte Fresh Produce Company, and indirect shareholder of Petitioner, Compañía de Desarrollo de Guatemala, S.A.

Del Monte Fresh Produce Company is a minority shareholder of Petitioner, Compañía de Desarrollo de Guatemala, S.A.

Compañía de Desarrollo de Guatemala, S.A.

Respondents:

Aldana, Angel Enrique Villeda
Evans, Oscar Leonel Guerra
Hernandez, Rigoberto Alvayero

Martinez, Gumerzindo Loyo
Martinez, Marel
Rodriguez, Lyionhel McIntosch
Romero, Jorge Agustin Palma

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Aldana v. Del Monte Fresh Produce, N.A., Inc., 452 F.3d 1284 (11th Cir. 2006) (order denying rehearing *en banc* of partial reversal of dismissal for lack of federal subject matter jurisdiction).

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1), based upon an order of the United States Court of Appeals for the Eleventh Circuit (the "Eleventh Circuit") dated July 8, 2005, which determined that the District Court had subject matter jurisdiction to consider a claim for mental torture in alleged violation of the Alien Tort Statute, 28 U.S.C. § 1350 and the Torture Victim Protection Act, 28 U.S.C. § 1350, note. The Eleventh Circuit's order conflicts with this Court's holding in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), which delineated the narrow jurisdictional contours of the Alien Tort Statute and

further conflicts with the opinions of other United States courts of appeals. *See Bingler v. Johnson*, 394 U.S. 741, 747 (1969) (granting petition for certiorari to resolve conflict among circuit courts of appeal as to interpretation of federal statute); *Egan v. City of Aurora*, 365 U.S. 514, 515 (1961) (granting petition for certiorari to review an opinion which misconstrued or conflicted with an opinion of this Court); *Wilkinson v. U.S.*, 365 U.S. 399, 401 (1961) (same).

The Eleventh Circuit denied rehearing *en banc* of the subject order on June 23, 2006. *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 452 F.3d 1284 (11th Circ. 2006). This Petition for Writ of Certiorari is filed within 90 days of the Eleventh Circuit's order denying Petitioners' petition for rehearing *en banc*. Sup. Ct. R. 13.3.

RELEVANT PROVISIONS INVOLVED

Alien Tort Statute, 28 U.S.C. § 1350:

> "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

Torture Victim Protection Act, 28 U.S.C. § 1350 note:

> TORTURE VICTIM PROTECTION
> Pub.L. 102-256, Mar. 12, 1992, 106 Stat. 73, provided that:
> "Section 1. Short Title.
> "This Act may be cited as the 'Torture Victim

Protection Act of 1991'.

"Sec. 2. Establishment of civil action.

"(a) Liability.--An individual who, under actual or apparent authority, or color of law, of any foreign nation--

"(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or

"(2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

"(b) Exhaustion of remedies.--A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.

"(c) Statute of limitations.--No action shall be maintained under this section unless it is commenced within 10 years after the cause of action arose.

"Sec. 3. Definitions.

"(a) Extrajudicial killing.--For the purposes of this Act, the term 'extrajudicial killing' means a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a

foreign nation.

"(b) Torture.--For the purposes of this Act--

"(1) the term 'torture' means any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind; and

"(2) mental pain or suffering refers to prolonged mental harm caused by or resulting from--

"(A) the intentional infliction or threatened infliction of severe physical pain or suffering;

"(B) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

"(C) the threat of imminent death; or

"(D) the threat that another individual will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality."

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, U.N. GAOR, Supp. No. 51, U.N. Doc. A/39/51 (1984), reprinted in 23 I.L.M. 1027 and 1465 U.N.T.S. 85:

In pertinent pa t, the Convention on Torture defines "torture" as

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in any capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Convention Against Torture, Dec. 10, 1984, 1465 U.N.T.S. 85, at Part 1, Art. 1, § 1

Entire text attached at Appendix, item 4.

Resolution of Ratification of Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, 136 Cong. Rec. S10091-02, 1990 WL 100492 (July 19, 1990):

Pertinent text attached at Appendix, item 5.

STATEMENT

The Basis for Federal Jurisdiction in the Court of First Instance

Respondents/Plaintiffs (hereinafter, "Plaintiffs") are Guatemalan citizens. Plaintiffs' claims are based on events which allegedly took place in Guatemala during a one-night altercation between Guatemalan townspeople and local labor union members. Plaintiffs allege they were workers at the Bobos banana plantation in Morales, Izabal, Guatemala, and were officers of a Guatemalan labor union called Sindicato de Trabajordores del Banano de Izabal ("SITRABI"). The Bobos plantation at one time was operated by Petitioner/Defendant, Compañía de Desarrollo de Guatemala, S.A. a/k/a Bandegua (hereinafter, "Bandegua"), a Guatemalan corporation.[1]

Plaintiffs brought a Third Amended Complaint against the Petitioners/Defendants (hereinafter, "Defendants") in the United States District Court for the Southern District of Florida (the "District Court") seeking damages, declaratory relief, and injunctive relief against Defendants by attempting to invoke the original subject matter jurisdiction of the District Court under the Alien Tort Statute, 28 U.S.C. § 1350

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[1] Petitioner/Defendant, Del Monte Fresh Produce Company, a Delaware corporation, is a minority shareholder of Bandegua, and Petitioner/Defendant, Fresh Del Monte Produce Inc. is the indirect parent corporation of both Del Monte Fresh Produce Company and of Bandegua.

(the "ATS"), the Torture Victim Protection Act of 1991, 28 U.S.C. § 1350, note (the "TVPA"), and/or the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* (the "RICO Act"). Plaintiffs also alleged the existence of diversity jurisdiction pursuant to 28 U.S.C. § 1332. Third Amended Complaint, (App.-6), ¶ 4. Plaintiffs also asserted various non-federal claims and alleged the existence of supplemental jurisdiction pursuant to 28 U.S.C. § 1367. Third Amended Complaint ¶ 4.[2]

Course of Proceedings

The District Court dismissed all of the counts based on the ATS, TVPA and RICO Act for lack of federal subject matter jurisdiction and declined to accept jurisdiction over the non-federal claims pursuant to 28 U.S.C. § 1367. With regard to the dismissal of the federal claims, the District Court held that Plaintiffs had failed to allege sufficient facts to state a claim under the ATS and TVPA in order to invoke the District Court's subject matter jurisdiction. *Aldana v. Fresh Del Monte Produce, Inc.*, 305 F. Supp. 2d 1285 (S.D. Fla. 2003) (the "Dismissal Order").[3] (App.-2).

Plaintiffs appealed the District Court's dismissal of the ATS and TVPA claims to the United States

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[2] The Fifth through Twelfth Causes of Action in the Third Amended Complaint asserted claims for battery, assault, arbitrary arrest and detention, false imprisonment, intentional infliction of emotional distress, negligent infliction of emotional distress, negligence per se, and aiding and abetting, respectively.

[3] Plaintiffs did not appeal the dismissal of the RICO Act claim or the District Court's decision to decline supplemental jurisdiction over the non-federal claims under 28 U.S.C. § 1367.

Court of Appeals for the Eleventh Circuit (the "Eleventh Circuit").[4] The Eleventh Circuit, by order dated July 8, 2005, affirmed in part and reversed in part the Dismissal Order. *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242 (11th Cir. 2005) (the "Opinion"). (App.-1). The Eleventh Circuit held that the Plaintiffs had failed to allege legally sufficient claims under the ATS for "cruel, inhuman, degrading treatment or punishment," for "arbitrary detention," and for "crimes against humanity." *Id.* at 1247. The Eleventh Circuit also affirmed the dismissal of the Plaintiff's torture claims predicated on "intentionally inflicted physical pain and suffering." *Id.* at 1253. However, with regard to the Plaintiffs' claim that they had endured *mental* suffering caused by non-physical torture in alleged violation of the ATS and TVPA, the Eleventh Circuit reversed. *Id.* at 1247. The Eleventh Circuit concluded that the allegations of an eight-hour detention during which threats of death were communicated to the Plaintiffs at gunpoint were sufficient to state a violation of the ATS and TVPA for mental torture and to confer subject matter jurisdiction on the District Court. *Id.* at 1251. The Eleventh Circuit denied Petitioners' motion for rehearing *en banc*. *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 452 F.3d 1284 (11th Cir. 2006). (App.-3).

The Eleventh Circuit's Opinion conflicts with this Court's *Sosa* decision and two other decisions of

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[4] Because Plaintiffs chose to appeal the Dismissal Order instead of amending the Third Amended Complaint, the District Court's Dismissal Order became final. 416 F.3d at 1244 n.1 (citing *Schuurman v. Motor Vessel "Betty K V,"* 798 F.2d 442, 445 (11th Circ. 1986)).

the D.C. Circuit on the threshold question of whether the misconduct alleged in the Third Amended Complaint is sufficient to permit alien plaintiffs to litigate such claims in the federal courts of the United States. Petitioners respectfully suggest that it is not sufficient, and that the Eleventh Circuit has failed to comply with this Court's express instruction in *Sosa* to be a "vigilant doorkeeper" of tort claims not worthy of federal jurisdiction.

Facts Material to the Questions Presented

All of the salient facts necessary to a determination of this Petition for Writ of Certiorari are contained in the Third Amended Complaint, (App.-6), and summarized comprehensively in the Eleventh Circuit's Opinion. (App.-1). Because the underlying appeal arises from an order dismissing the Third Amended Complaint for lack of federal subject matter jurisdiction, all of the factual allegations in the Third Amended Complaint are accepted as true, and all ambiguities and inferences are construed in the light most favorable to the Appellants. *Gladstone Realtors v. Village of Bellwood,* 441 U. S. 91, 109 (1979).

In sum, the Third Amended Complaint alleges that Plaintiffs, during a period of approximately eight hours between 5:45 p.m. on October 13, 1999 and 2:00 a.m. on October 14, 1999, were rounded up at gunpoint by a large and unruly mob of townspeople in Morales, Guatemala -- allegedly at the instigation of the Petitioners -- and forced to resign their positions with their local labor union, SITRABI. Third Amended Complaint, (App.-6), ¶¶ 6-12, 22-55. The Mayor of Morales is alleged to have been present during some

portion of the events, *id.* at ¶ 47, but there are no allegations that the Mayor was acting in an official capacity or participated in any of the threats. Plaintiffs further allege that other unidentified Morales municipal officials were also present, although there is no allegation concerning the nature (official or otherwise) of their purported involvement. *See id.* at ¶¶ 29, 72.

Plaintiffs allege that during the ordeal they were threatened verbally with death if they did not resign their union positions and cancel a planned labor protest. *See id.* at ¶¶ 34-38, 40, 43-48, 50. There are no allegations anywhere in the Third Amended Complaint that any of the Plaintiffs were beaten, slapped, bloodied, electrically shocked, tied up, hung, or physically abused in any fashion. Nor are there any allegations in the Third Amended Complaint that any Plaintiff's family member was threatened or physically abused by the assailants or that any Plaintiff was required to watch the physical torturing of third persons.

At the conclusion of the eight-hour ordeal, all Plaintiffs were released alive and unharmed. *See id.* at ¶ 55. And, as the Eleventh Circuit's Opinion makes clear, no Plaintiff was physically injured. "[T]he only specified acts of physical violence we can discern from the complaint involves pushing, shoving and having one's hair pulled. These acts do not constitute severe pain or suffering." 416 F.3d at 1253. However, the Eleventh Circuit ultimately found, by incorporating an allegation contained in a pendent non-federal claim alleging *negligent* infliction of emotional distress, that Plaintiffs had alleged intentionally inflicted emotional pain and suffering through acts that could constitute

"torture." *Id.* at 1252-53.

REASONS FOR GRANTING THE PETITION

The Eleventh Circuit's Opinion below misapplies the Alien Tort Statute, 28 U.S.C. § 1350 and the Torture Victim Protection Act, 28 U.S.C. § 1350, note, and conflicts with this Court's opinion in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) and other decisions of U.S. circuit courts.

Petitioners respectfully suggest that the Eleventh Circuit's Opinion is irreconcilably inconsistent with this Court's holding in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), which delineated the narrow jurisdictional contours of the ATS, and is also in conflict with the holdings of other federal circuit courts[5] that have addressed the jurisdictional prerequisites to hear a claim for "torture" under international law and the TVPA.

The essence of the Eleventh Circuit's Opinion is that a mere aggravated armed assault, lasting no more than eight hours, during which the Plaintiffs were verbally abused and threatened with death at gunpoint, but were not physically abused and suffered no bodily injuries, constitutes severe and prolonged mental "torture" under the ATS and the TVPA. Petitioners respectfully disagree, principally for the reasons

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[5] *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82 (D.C. Cir. 2002) and *Simpson v. Socialist People's Libyan Arab Jamahiriya*, 326 F.3d 230 (D.C. Cir. 2003).

already articulated by the Court in *Sosa* and for the reasons articulated by the D.C. Circuit in *Price* and *Simpson*.

To invoke the subject matter jurisdiction of the District Court under the ATS, an alien plaintiff is required to allege the commission of a tort in "violation of the law of nations." 28 U.S.C. § 1350. To state a claim of torture under the TVPA, a plaintiff must allege that he or she suffered "severe" *and* "prolonged" physical or psychological pain and suffering at the hands of third persons. 28 U.S.C. § 1350 note, § 3(b)(1) and (2). Relying on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, U.N. GAOR, Supp. No. 51, U.N. Doc. A/39/51 (1984), reprinted in 23 I.L.M. 1027 and 1465 U.N.T.S. 85 ("Convention Against Torture"), the Eleventh Circuit held that the Plaintiffs' allegations of the Third Amended Complaint were sufficient to allege "torture" under the ATS and sufficient to independently state a claim for torture under the TVPA.[6]

Petitioners do not quarrel with the Eleventh Circuit's recognition that torture may, under appropriate circumstances, constitute a tort in violation

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[6] The Eleventh Circuit held that "torture" was defined differently under the ATS and TVPA, 416 F.3d at 1252, although the Opinion did not articulate the distinctions, noting only that "[i]n some cases, the different definitions might actually make a difference." *Id.* The Eleventh Circuit further held that an alien "may bring distinct claims for torture under" the ATS and the TVPA, a holding that the court conceded is in conflict with the decision of the Seventh Circuit in *Enahoro v. Abubakar*, 408 F.3d 877 (7th Cir. 2005). 416 F.3d at 1250-51.

of international law sufficient to confer jurisdiction under the ATS. Rather, Petitioners disagree with the Eleventh Circuit's conclusion that the "acts alleged in the [Third Amended Complaint] can be considered torture under (a) the law of nations (for ATS purposes); and (b) the TVPA statutory definition." 416 F.3d at 1251. Petitioners respectfully suggest that the gist of the Third Amended Complaint -- an eight-hour armed assault involving no physical abuse of Plaintiffs -- does not constitute actionable "torture" under the ATS because the allegations lack the severe, heinous and prolonged quality of misconduct recognized by the "law of nations." The allegations fail to state a claim under the TVPA for the same reasons. In other words, the Eleventh Circuit has set the jurisdictional bar so low that practically any allegation of a verbal death threat is sufficient to invoke a federal district court's jurisdiction, a result at complete odds with the dictates of *Sosa*. The Eleventh Circuit's Opinion, in effect, opens the federal courts to nearly all lawsuits in which aliens claim to have been emotionally – but not physically – traumatized by *any* incident in which a death threat is communicated to, *or perceived by*, the alleged victim. *Sosa* does not sanction this result. Neither does the Convention Against Torture or the TVPA.

The Standards Established by the Supreme Court, International Conventions, Congress and the D.C. Circuit

This Court in *Sosa* expressly instructed lower courts to exercise their judicial power under the ATS with "great caution," and made clear that the jurisdictional door under the ATS is open, in the

modern era, to exceedingly few torts recognized to be in violation of the law of nations. *Sosa*, 542 U.S. at 729. This Court observed that "we have found no basis to suspect Congress [in 1789] had any examples in mind beyond those torts corresponding to Blackstone's three primary offenses: violation of safe conduct, infringement of the rights of ambassadors, and piracy." *Id.* at 724. Further, this Court stated:

> [T]here are good reasons for a restrained conception of the discretion a federal court should exercise in considering a new cause of action of this kind. Accordingly, we think courts should require any claim based on the present day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th century paradigms we have recognized.

Id. at 725.

Sensitive to the limited role of federal courts in *applying* -- and not *legislating* -- international law, this Court held that the "judicial power [to find violations of international law under the ATS] should be exercised on the understanding that the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today." *Id.* at 729.

To determine whether the allegations of the Third Amended Complaint rise to the level of a violation of international law, as well as to state a claim under the TVPA, the Eleventh Circuit's Opinion looked exclusively to the definition of torture contained in the

Convention Against Torture, *see* 416 F.3d at 1251, which the United States signed in 1988 and ratified, with reservations (the "U.S. Reservations"), two years later. *See* Resolution of Ratification of Convention Against Torture, 136 Cong. Rec. S10091-02, 1990 WL 100492 (July 19, 1990). (App.-5). The definition of torture contained in the TVPA[7] tracks, in all material respects, the Convention Against Torture,[8] *see Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 92 (D.C. Cir. 2002), and expressly provides that "mental pain or suffering" refers to "*prolonged* mental harm caused by or resulting from . . . the intentional infliction or threatened infliction of *severe* physical pain or suffering ... [or] the threat of imminent death." TVPA, 28 U.S.C. § 1350, note § 3(b)(2) (emphasis added); *see also* U.S. Reservations, at § II(1)(a) to the Convention on Torture, 136 Cong. Rec. at S10,093 ("[T]o constitute torture, an act must be specifically intended to inflict *severe* physical or mental pain or suffering and that mental pain and suffering refers to *prolonged* mental harm . . . ." (emphasis added).

The D.C. Circuit in *Price* was confronted with the very question presented by this Petition, *i.e.*, "how broadly the definition of torture was intended to sweep." *Price*, 294 F.3d at 92. Noting that both the Convention Against Torture and the TVPA require torture to be "severe" to be actionable, the *Price* court asked: "How much actual pain or suffering must

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[7] 28 U.S.C. § 1350 note § 3(b).

[8] "Indeed, the TVPA was passed in part to fulfill the Convention's mandate that ratifying nations take action to ensure that torturers are held legally accountable for their actions." *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 92 (D.C. Cir. 2002).

defendants inflict before their conduct rises to the level of torture?" *Id.*

> The severity requirement is crucial to ensuring that the conduct proscribed by the Convention and the TVPA *is sufficiently extreme and outrageous to warrant the universal condemnation that the term "torture" both connotes and invokes. . . .* The drafters of the Convention, as well as the Reagan Administration that signed it, the Bush Administration that submitted it to Congress, and the Senate that ultimately ratified it, therefore all sought to ensure that *"only acts of a certain gravity shall be considered to constitute torture."* J. Herman Burgers & Hans Danelius, The United Nations Convention against Torture 117 (1988); *see also* S. Exec. Rep. No. 101-30, at 14 (1990) ("The term 'torture,' in the United States and international usage, *is usually reserved for extreme, deliberate and unusually cruel practices,* for example, sustained systematic beating, application of electric currents to sensitive parts of the body, and tying up or hanging in positions that cause extreme pain.").
>
> The critical issue is the degree of pain and suffering that the alleged torturer intended to, and actually did, inflict upon the victim. The more intense, lasting, or heinous the agony, the more likely it is to be torture. *See* S. EXEC. REP. NO. 101-30, at 15 ("*The United States understands that, in order to constitute torture, an act must be a deliberate and calculated act of*

> *an extremely cruel and inhuman nature, specifically intended to inflict excruciating and agonizing physical or mental pain or suffering.*") (internal quotation marks omitted). This understanding thus makes clear that torture does not automatically result whenever individuals in official custody are subjected even to direct physical assault. Not all police brutality, not every instance of excessive force used against prisoners, is torture under the FSIA.[9]

Price, 294 F.3d at 92-93 (emphasis added).

The legislative history to the TVPA confirms Congress' intent to limit torture to exceedingly heinous acts. *See* S. Rep. No. 102-249, 102nd Congress, 1st Sess. 1991, at § IV ("The definition of torture in this bill includes word-for-word the understandings included by the Senate concerning the definition of torture in the Torture Convention when it ratified that convention on October 27, 1990 (Understandings 1(a) and (b)).").

Applying these principles, the *Price* court held that

> there is no way to determine from the present complaint the severity of plaintiffs' alleged

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[9] The *Price* court was assessing whether the plaintiffs' allegations were sufficient to constitute torture under the "Flatow Amendment" to the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1605 (note), noting that the "FSIA's definition of torture derives from the meaning given that term in section 3 of the Torture Victim Protection Act of 1991," which definition in turn "borrows extensively from the 1984 United States [Convention on Torture]." *Price*, 294 F.3d at 92.

> beatings -- including their frequency, duration, the parts of the body at which they were aimed, and the weapons used to carry them out -- in order to ensure that they satisfy the TVPA's rigorous definition of torture. . . . Thus, the facts pleaded do not reasonably support a finding that the physical abuse allegedly inflicted by Libya evinced the degree of cruelty necessary to reach a level of torture.

Price, 294 F.3d at 93-94. The plaintiffs in *Price* were required to re-plead their claim with greater specificity to assure the court that actionable torture occurred.

Similarly, the D.C. Circuit in *Simpson v. Socialist People's Libyan Arab Jamahiriya*, 326 F.3d 230 (D.C. Cir. 2003), undertook the identical analysis to determine whether the plaintiff's allegations of incommunicado interrogations and repeated death threats over the course of approximately *three months* of captivity, and forcible separation from her husband for *four additional months*, were sufficient to constitute torture. *Simpson*, 326 F.3d. at 232, 234. The *Simpson* court, applying the principles articulated in *Price*, held, as matter of law, that "[a]lthough these alleged acts certainly reflect a bent toward cruelty on the part of their perpetrators, they are not in themselves so unusually cruel or sufficiently extreme and outrageous as to constitute torture with the meaning of the Act." *Id.* at 234.

Price, *Simpson*, and the legislative histories of the Convention Against Torture and the TVPA confirm that claims of torture, whether prosecuted as violations of the "law of nations" under the ATS or as substantive

claims under the TVPA, must involve something more than a mere armed assault, of limited duration, where none of the victims was physically abused or injured.

The Eleventh Circuit's Opinion Conflicts with Established Standards

The Eleventh Circuit's Opinion wholly ignores any analysis of the "severity" or "prolonged" requirements imposed by the Convention Against Torture or the TVPA.[10] Instead, the Eleventh Circuit erroneously endorses a form over substance approach, rewarding the artful pleading of the technical components of a statutory and treaty definition, *see* 416 F.3d at 1252-53, without assessing whether the factual allegations amount to universally condemned, heinous

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[10] Further, in analyzing the sufficiency of the allegations of state action in the Third Amended Complaint, Petitioners respectfully suggest that the Eleventh Circuit failed to uphold the stringent pleading standards and fulfill its role as a "vigilant doorkeeper." Specifically, the Convention Against Torture expressly provides that the torture be "inflicted by or at the instigation of or with the consent or acquiescence of a public official." Convention Against Torture, Dec. 10, 1984, 1465 U.N.T.S. 85. "[T]he term 'acquiescence' requires that the public official, *prior to the activity constituting torture, have awareness of such activity and thereafter breach his legal responsibility to intervene to prevent such activity.*" U.S. Reservations at § II(1)(d), 136 Cong. Rec. at S10,093 (emphasis added). Moreover, the TVPA requires that the victim of the torture be in the offender's "custody or physical control." *See* 28 U.S.C. § 1350 note § 3(b)(1). Nowhere in the Third Amended Complaint did Appellants allege that the Mayor (or any governmental official) was aware of the alleged torture prior to it allegedly being committed, that the Mayor breached a legal responsibility to intervene to prevent such alleged activity, or that any Appellant and/or aggressor was under the Mayor's custody or physical control.

torture and not a garden variety tort unrecognized by the law of nations. When assessing the sufficiency of a claim under the ATS, "[c]ourts have, accordingly, engaged in a *more searching preliminary review of the merits* than is required, for example, under the more flexible 'arising under" formulation." *Filartiga v. Pena-Irala*, 630 F.2d 876, 877-78 (2d Cir. 1980) (emphasis supplied). The Opinion ignores this well-accepted pleading rule.

The ATS requires courts (not juries) to act as jurisdictional gatekeepers and to dismiss claims that do not allege torts universally recognized to be violations of international law. A federal court is not bound to accept a plaintiff's labels, legal aphorisms, or "legal conclusions masquerading as facts" when assessing the sufficiency of an ATS or TVPA claim, a principle acknowledged in the Opinion by the Eleventh Circuit. *See* 416 F.3d at 1246 (citing *Oxford Asset Mgmt., Ltd. v. Jaharis*, 297 F.3d 1182, 1188 (11th Cir. 2002)).

Merely alleging "torture" and tracking the language of a statutory definition is plainly insufficient to confer subject matter jurisdiction under the ATS or to state a claim under the TVPA. Were it so, the floodgates of unworthy ATS and TVPA claims would surely open, a consequence this Court in *Sosa* specifically cautioned against: "[T]he determination whether a norm is sufficiently definite to support a cause of action should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts." *Sosa*, 542 U.S. at 732-33.

Further, the Eleventh Circuit failed to even

address the requirement of the Convention Against Torture and the TVPA that the alleged torture be "prolonged." *See generally* 416 F.3d, at 1250-53.[11] In *Sosa*, this Court exercised its role as a "vigilant doorkeeper" when determining the sufficiency of a claim for arbitrary detention under the ATS. 542 U.S. at 731-739. In so doing, this Court addressed whether "a single illegal detention of less than a day" constituted the tort of "unlawful detention" in violation of the law of nations. *Id.* at 735-738. After determining that there was "little authority that a rule so broad has the status of a binding customary norm today," and citing, *inter alia*, the Restatement (Third) of Foreign Relations Law of the United States (1987) concerning "*prolonged* arbitrary detention," this Court recoiled at the practical consequences of permitting such a tort to satisfy the ATS's stringent jurisdictional requirement:

> [Plaintiff] certainly cites nothing to justify the federal courts in taking his broad rule as the predicate for a federal lawsuit, *for its*

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[11] Paradoxically, applying *Sosa*, the Eleventh Circuit held that the "short time of the detention" of the Plaintiffs was insufficient to state a claim under the ATS for "arbitrary detention." 416 F.3d at 1247. Yet, the Eleventh Circuit's Opinion does not address why an eight-hour period is inadequate for arbitrary detention but is adequate for torture, particularly when any accepted definition of torture includes a requirement that the misconduct be "prolonged." *See* TVPA, 28 U.S.C. § 1350, note § 3(b)(2) ("mental pain or suffering" refers to "prolonged mental harm. . . ."); U.S. Reservations, at § II(1)(a) to the Convention on Torture, 136 Cong. Rec. at S10,093 ("[T]o constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain and suffering refers to prolonged mental harm . . . .").

> *implications would be breathtaking.* His rule would support a cause of action in federal court for any arrest, anywhere in the world, unauthorized by the law of the jurisdiction in which it took place, and would create a cause of action for any seizure of an alien in violation of the Fourth Amendment, ...

Id. at 736 (emphasis added).

This Court concluded that "[i]t is enough to hold that a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy." *Id.* at 738.

Petitioners respectfully suggest that the instant case mirrors *Sosa*, and its outcome should have been determined by *Sosa*. Plaintiffs' incantation in the Third Amended Complaint of the elements of the torture definition under the TVPA or the Convention Against Torture does not mean that "torture," as proscribed by the ATS and the TVPA, has been sufficiently alleged. Were it so, and applying the words of this Court in *Sosa*, Plaintiffs' strategy would "support a cause of action in federal court for any [assault], anywhere in the world, unauthorized by the law of the jurisdiction in which it took place," *see id.* at 736, and would create a cause of action any time an alien claimed that a death threat was verbally communicated. Just as in *Sosa*, Plaintiffs' contention that an armed assault of less than eight hours, in which no physical abuse was inflicted and no bodily injury was suffered, followed by Plaintiffs' release and safe return to their families,

"violates no norm of customary international law so well defined as to support the creation of a federal remedy." *Id.* at 738.

CONCLUSION

For the reasons set forth above, Petitioners respectfully request that a writ of certiorari should issue to review the Opinion of the United States Court of Appeals for the Eleventh Circuit and, ultimately, vacate that portion of the Opinion which permits the Plaintiffs to invoke federal subject matter jurisdiction under the ATS and the TVPA based on their insubstantial and inadequate allegations of mental suffering; to affirm the District Court's Dismissal Order; and to grant such additional relief as the Court deems just and appropriate under the circumstances.

Respectfully submitted,

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No. 04-10234

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

ANGEL ENRIQUE VILLEDA ALDANA, JORGE AUGUSTIN PALMA ROMERO, OSCAR LEONEL GUERRA EVANS, LYIONHEL MCINTOSH RODRIGUEZ, MAREL MARTINEZ, GUMERZINDO LOYO MARTINEZ, RIGOBERTO ALVAYERO HERNANDEZ,
Plaintiffs-Appellants,

versus

DEL MONTE FRESH PRODUCE, N.A., INC., BANDEGUA, Compania De Desarrollo De Guatemala, FRESH DEL MONTE PRODUCE, INC., Defendants-Appellees.

July 8, 2005, Decided

July 8, 2005, Filed

JUDGES: Before EDMONDSON, Chief Judge, WILSON, Circuit Judge, and RESTANI *, Judge.

OPINION: PER CURIAM

Plaintiffs-Appellants ("Plaintiffs") filed a twelve-count complaint against Defendant-Appellee ("Del Monte") in the United States District Court for the Southern District of Florida. The complaint alleged violations of federal and state laws. n1 The district court granted

Del Monte's motion to dismiss for failure to state a claim on the federal law claims, and it dismissed the remaining state law claims for lack of jurisdiction. We affirm in part, vacate in part and remand.

BACKGROUND

Because the district court granted Del Monte's motion to dismiss, the facts are taken from the well pleaded allegations of the complaint. *Chepstow Ltd. v. Hunt*, 381 F.3d 1077, 1080 (11th Cir. 2004) (citations omitted). Plaintiffs are seven Guatemalan citizens currently residing in the United States. Del Monte is a Delaware company; its principal place of business is in Coral Gables, Florida. In Guatemala, Plaintiffs were officers in SITRABI, a national trade union of plantation workers. At the time in question, they represented workers on a Bandegua banana plantation in the municipality of Morales, Izabal. Bandeuga is a wholly-owned subsidiary of Del Monte.

SITRABI and Bandegua were negotiating a new collective bargaining agreement for workers at the plantation. While those negotiations were ongoing, Bandegua terminated 918 workers. SITRABI responded by filing a complaint in the Labor Court of Guatemala. Negotiations continued.

Plaintiffs allege that on or before 13 October 1999, Bandegua hired or established an agency relationship with a private, armed security force. Private security forces are permitted and regulated in Guatemala. According to Plaintiffs, on 13 October 1999, Del Monte agents met with the security force "to plan violent action against the Plaintiffs and other SITRABI

leaders." Plaintiffs do not allege that government officials attended the meeting.

According to Plaintiffs, at 5:45 p.m. the security force, which is described as "a gang of over 200 heavily armed men," arrived at SITRABI's headquarters in Morales, Izabal. There, the security force held two Plaintiffs hostage, threatened to kill them, and shoved them with guns. Throughout the evening, other SITRABI leaders were lured, abducted or otherwise forced to the headquarters and similarly detained. n2 Once the seven SITRABI leaders were in the headquarters, "a leader of the security force . . . who claimed to be the President of the [municipal] Chamber of Commerce," blamed Plaintiffs for the area's economic decline. The official also explained that Plaintiffs' union activity could cause Del Monte to abandon the plantation. Later, a mayoral candidate appeared. While the candidate was at SITRABI headquarters, the security force "reached a consensus that the two main leaders of SITRABI [both of whom are Plaintiffs in this case] would be taken to a radio station . . . where they would be forced to denounce the union." Plaintiffs also allege that the actual Mayor of Morales participated. He, along with "several other armed aggressors," allegedly accompanied Plaintiffs to a radio station. There, Plaintiffs, at gunpoint, announced the labor dispute was over and that they were resigning. Members of the security force then forced the two Plaintiffs back to the headquarters. At headquarters, they received a facsimile of a "model resignation form," purportedly sent from Del Monte or Bandegua. The Plaintiffs then signed the letters at gunpoint and were released -- after being detained for more than eight hours -- at 2:00 a.m. on 14 October 1999. The leader of

the security force allegedly threatened to kill Plaintiffs if they failed to leave Guatemala or relocated to Mexico. Plaintiffs now live in the United States.

Based on these allegations, Plaintiffs brought twelve claims against Del Monte and Bandegua in the district court. That court granted Del Monte's motion to dismiss for failure to state a claim. Plaintiffs have appealed the dismissal of their claims brought under the Alien Tort Act, 28 U.S.C. § 1350 ("ATA"), and the Torture Victim Protection Act, which is published as a historical and statutory note to the ATA, codified at 28 U.S.C. § 1350 (1991) ("TVPA").

STANDARD OF REVIEW

We review motions to dismiss *de novo*; all facts are taken from the complaint. *Chepstow Ltd. v. Hunt*, 381 F.3d 1077, 1080 (11th Cir. 2004) (citations omitted). Ambiguities are construed in the light most favorable to the nonmovant, Plaintiffs. *Miccosukee Tribe of Indians of Fla. v. So. Everglades Restoration Alliance*, 304 F.3d 1076, 1084 (11th Cir. 2002). We can affirm the district court's dismissal of the complaint only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Jones v. Am. Gen. Life & Accident Ins. Co.*, 370 F.3d 1065, 1069 (11th Cir. 2004) (citing *Cryder v. Oxendine*, 24 F.3d 175, 176 (11th Cir. 1994) (internal quotations omitted)). But, "conclusory allegations, unwarranted deductions of facts or legal conclusions masquerading as facts will not prevent dismissal." *Oxford Asset Mgmt., Ltd. v. Jaharis*, 297 F.3d 1182, 1188 (11th Cir. 2002).

DISCUSSION

1. *The Non-Torture Alien Tort Act Claims.*

The Alien Tort Act provides that "the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (2005). To obtain relief under the ATA, plaintiffs must be (1) an alien, (2) suing for a tort, which was (3) committed in violation of international law. *Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11th Cir. 1996). The first two elements are not disputed. Del Monte does challenge Plaintiffs' contention that the underlying acts show a violation of the laws of nations: prohibitions against (1) cruel, inhuman, degrading treatment or punishment; (2) arbitrary detention; and (3) crimes against humanity.

The Supreme Court recently interpreted the Alien Tort Act in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 124 S. Ct. 2739, 159 L. Ed. 2d 718 (2004). There, the Court explained that the ATA is jurisdictional in nature but that it also provides a cause of action "for the modest number of international law violations with a potential for personal liability at the time [of its enactment]." 124 S. Ct. at 2761. n3 According to the Court, causes of action under the ATA are not static; new ones may be recognized, if the claim is "based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th century paradigms we have recognized." 124 S. Ct. at 2761-62. n4 But the Court said that federal courts should exercise "great caution" when considering new

causes of action, and maintain "vigilant doorkeeping . . . thus [opening the door] to a narrow class of international norms [recognized] today." 124 S. Ct. at 2763, 2764.

Based largely on our reading of Sosa, we agree with the district court's dismissal of Plaintiffs' non-torture claims under the Alien Tort Act. We see no basis in law to recognize Plaintiffs' claim for cruel, inhuman, degrading treatment or punishment. In reaching this conclusion, we acknowledge that two district courts of this Circuit recognized such a cause of action. See *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1347 (N.D. Ga. 2002) (Bosnian war crimes); *Cabello v. Fernandez-Larios*, 157 F. Supp. 2d 1345, 1361 (S.D. Fla. 2001) (political assassination) aff'd on different grounds by 402 F.3d 1148, 1161 (11th Cir. 2005). But both of those courts relied on the International Covenant on Civil and Political Rights, *Mehinovic*, 198 F. Supp. 2d at 1347, Cabello, 157 F. Supp. 2d at 1361. Sosa explains that the International Covenant did not "create obligations enforceable in the federal courts." 124 S. Ct. at 2767. Accordingly, we affirm the district court's decision on the cruel, inhuman, degrading treatment or punishment claims.

We do the same for Plaintiffs' claim for arbitrary detention. In Sosa, the Court determined that "a single illegal detention of less than a day . . . violates no norm of customary international law so well defined as to support the creation of a federal remedy." 124 S. Ct. at 2769. The detention alleged here was more frightening than the one in Sosa; still, the short time of the detention here causes the legal principle announced by

the Court in Sosa to guide us. We, therefore, affirm the district court's conclusion.

We also agree with the district court's dismissal of the crimes against humanity claim. First, such crimes were not expressly plead in the complaint. See *Emory v. Peeler*, 756 F.2d 1547, 1550 n.3 (11th Cir. 1985) (considering only the "naked complaint" when reviewing a motion to dismiss). Second, to the extent that crimes against humanity are recognized as violations of international law, they occur as a result of "widespread or systematic attack" against civilian populations. See *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1161 (11th Cir. 2005). Those kinds of words are not found in the complaint, but instead in Plaintiffs' appellate brief. The appellate brief cannot supply the necessary facts to overcome Del Monte's motion to dismiss. See *Emory*, 756 F.2d at 1550 n.3. And, Plaintiffs' reliance -- found exclusively in the appellate brief -- on alleged systematic and widespread efforts against organized labor in Guatemala is too tenuous to establish a prima facie case, especially in the light of Sosa's demand for vigilant doorkeeping.

2. *Claims For Torture Under The Alien Tort Act And Torture Victim Protection Act.*

a. State Action.

State-sponsored torture, unlike torture by private actors, likely violates international law and is therefore actionable under the Alien Tort Act. See *Kadic v. Karadzic*, 70 F.3d 232, 243-44 (2nd Cir. 1995) (citations omitted). The text of the Torture Victim Protection Act expressly requires the element of state action. Torture

Victim Protection Act § 2(a), 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 (Historical and Statutory Notes)). In construing this state action requirement, we look "to the principles of agency law and to jurisprudence under 42 U.S.C. § 1983." *Kadic*, at 245. A claim for state-sponsored torture under the Alien Tort Act or the Torture Victim Protection Act may be based on indirect liability as well as direct liability. *Cabello*, 402 F.3d at 1157. The Alien Tort Act "reaches conspiracies and accomplice liability," and the Torture Victim Protection Act reaches those who ordered, abetted, or assisted in the wrongful act. Id.

The complaint alleges three state acts or acts by state officials. First, Plaintiffs argue that Guatemala sanctions the acts of private security forces by permitting them to exist legally. (Compl. PP 66, 72). Second, Plaintiffs allege the police knew of and deliberately ignored the events at the SITRABI headquarters. (Compl. P 55). Third, Plaintiffs say broadly that unnamed "public officials . . . intentionally failed to take action in order to permit the violence to occur [and] were part of the security force." (Compl. P 29). The complaint later names the Mayor as such an official, (Compl. P 47), and it describes government officials of "the Bobos District" as "assisting" the security force. (Compl. P 66).

Guatemala's registration and toleration of private security forces does not transform those forces' acts into state acts. See *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 92 S. Ct. 1965, 1971-74, 32 L. Ed. 2d 627 (1972) (concluding state's alcohol licensing and regulatory scheme did not transform a private club with a liquor license into a state actor).

In addition, police inaction in response to events occurring not in their plain sight, but at least one hundred meters and two walls away, does not establish state action. n5 This lack of state action is particularly definite where, as here, Plaintiffs do not allege sufficient facts to warrant the inference that the National Police knew of and purposefully turned a blind eye to the events. "Some minimal pleading standard does exist. . . . 'Pleadings must be something more than an ingenious academic exercise in the conceivable.'" *Wagner v. Daewoo Heavy Indus. Am. Corp.*, 289 F.3d 1268, 1270 (11th Cir. 2002) (discussing generally what might be a reasonable inference in the pleading context) (internal citation omitted) rev'd en banc on other grounds, 314 F.3d 541 (11th Cir. 2002).

Plaintiffs allege the police station was spacially near the SITRABI headquarters, which leads Plaintiffs to deduce that the proximity made it certain the police knew of the events in question. We must make reasonable inferences in Plaintiffs' favor, but we are not required to draw Plaintiffs' inference. "Bald assertions" will not overcome a Rule 12(b)(6) motion. *DM Research, Inc. v. College of Am. Pathologists*, 170 F.3d 53, 55, 56 (1st Cir. 1999) (citation omitted) (affirming dismissal for failure to state a claim when complaint failed to allege "a factual predicate concrete enough to warrant further proceedings" and provided mere "speculations"). Likewise, "unwarranted deductions of fact" are not admitted as true in a motion to dismiss. *So. Fla. Water Dist. Mgmt. Dist. v. Montalvo*, 84 F.3d 402, 408 n.10 (11th Cir. 1996) (stating in dicta). The complaint here provides no factual basis to infer the police made a knowing choice to ignore Plaintiffs' alleged plight. It is unreasonable to infer, based on the facts alleged here

(alleged torture occurring indoors and an allegedly coerced indoor radio address someplace else), that just spacial proximity provides a reasonable basis for knowledge or intent on the part of the police. See generally *Wagner*, 289 F.3d at 1272.

We cannot say, however that a reasonable reading of the complaint's description of the Mayor's acts rules out state action. Paragraph twenty-nine is the first time government officials are mentioned: "public officials at the urging of Defendants and/or their agents intentionally failed to take action in order to permit the violence to occur. Further, various public officials were part of the security force." At least one public official, the Mayor, is identified by name in paragraph forty-seven: "Israel Vargas, who was the Mayor of Morales District . . . and several other armed aggressors" took two Plaintiffs at gunpoint and against their will to a radio station. The complaint also alleges later, in paragraph seventy-two, that "government officials" actually "assisted" the security force.

In the context of the whole complaint, the district court appears to have read these passages to describe the Mayor as merely present and not an active member of the security force. *Aldana v. Fresh Del Monte Produce, Inc.*, 305 F. Supp. 2d 1285, 1302 (S.D. Fla. 2003). The district court's reading might be one reasonable reading of the complaint. We cannot say, however, that it is the only reasonable reading of the complaint. Especially when read together with paragraphs twenty-nine and seventy-two, paragraph forty-seven can reasonably be read as depicting the Mayor as an "armed aggressor," not a mere observer. See *Magluta v. Samples*, 375 F.3d 1269, 1274-75 (11th Cir. 2004) (reading complaint in its

entirety when reviewing a motion to dismiss for failure to state a claim). See also 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1286 (3d ed. 2004) (a reviewing court gives effect to all averments). At its most specific point, the complaint states that the Mayor "and several other armed aggressors" took two Plaintiffs at gunpoint and against Plaintiffs' wills to a radio station. "At wŏrst, this language is ambiguous . . . and because the court was ruling on a motion to dismiss, the complaint should be construed in the light most favorable" to Plaintiffs. *Miccosukee Tribe of Indians of Fla. v. So. Everglades Restoration Alliance*, 304 F.3d 1076, 1084 (11th Cir. 2002).

For Plaintiffs, the favorable construction of the complaint is that the Mayor was one of the armed aggressors. The Mayor's active involvement in the process could have provided a sufficiently affirmative act to establish state action. n6 *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1156 n.2 (11th Cir. 2005). The Mayor's "mere presence" may not establish state action, but his alleged participation in the forcible events could. See *Cofield v. Randolph County Comm'n*, 90 F.3d 468, 471 (11th Cir. 1996). Because we believe the alleged acts are sufficient for now to establish state action on the part of the Mayor, we do not address Plaintiffs' other contention that the Mayor's inaction facilitated and caused their harm.

b. Torture Claims.

The district court also decided that Plaintiffs' claims did not constitute torture under either the Alien Tort Act or the Torture Victim Protection Act. *Aldana v. Fresh*

Del Monte Produce, Inc., 305 F. Supp. 2d 1285, 1294-95 (S.D. Fla. 2003). A preliminary question we must decide is whether recovery is permitted under the TVPA and the ATA, and if so, whether "torture" means the same thing for both statutes. We conclude that a plaintiff may bring distinct claims for torture under each statute.

The statutory texts support this conclusion. Torture is actionable under the Alien Tort Act, but only if the conduct is "committed in violation of the laws of nations." 28 U.S.C. § 1350 (2005). n7 By contrast, Congress provided an express definition of torture in the Torture Victim Protection Act. n8 These two definitions suggest each statute provides a means to recover for torture as that term separately draws its meaning from each statute.

Precedent also supports this conclusion. In *Abebe-Jira v. Negewo*, 72 F.3d 844, 847-48 (11th Cir. 1996), we construed the Alien Tort Act as conferring both a forum and a private right of action. Nothing in Sosa changes this conclusion; in fact, it confirms it. 124 S. Ct. at 2761-62. When describing the TVPA, the Supreme Court said it was an example of Congress providing a "clear mandate" to allow recovery for claims "confined to [a] specific subject matter[:]" torture and extrajudicial killing. *Id.* at 2763. But the Court did not say that the authority granted in the Torture Victim Protection Act provided the exclusive authority to hear torture claims. *Contra Enahoro v. Abubakar*, 408 F.3d 877, 2005 WL 1243178 at *6-7 (7th Cir. 2005).

We also rely on principles of statutory construction to reach our conclusion. To accept that the Torture Victim

Protection Act provides the exclusive remedy for acts of torture is to accept that it amends the Alien Tort Act. Such an intent to amend is not apparent from the face of the statute, and "amendments by implication are disfavored. Only when Congress' intent to repeal or amend is clear and manifest will we conclude that a later act implicitly repeals or amends an earlier one." *Patel v. Quality Inn So.*, 846 F.2d 700, 704 (11th Cir. 1988). That the TVPA, which was published in the Statues at Large, appears in the United States Code as a historical and statutory note to the Alien Tort Act does not make the TVPA any less the law of the land. See generally *Schwier v. Cox*, 340 F.3d 1284, 1288 (11th Cir. 2003).

Having decided that Plaintiffs can raise separate claims for state-sponsored torture under the Alien Tort Act and also under the Torture Victim Protection Act, we must decide whether the acts alleged in the complaint can be considered torture under (a) the law of nations (for ATA purposes); and (b) the TVPA's statutory definition. We conclude that Plaintiffs alleged sufficient facts to establish torture causing severe mental suffering under both statutes.

When courts seek to define torture in international law, they often look to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, Supp. No. 51, U.N. Doc. A/39/51 (1984), reprinted in 23 I.L.M. 1027. See, e.g., *In re Estate of Ferdinand Marcos Human Rights Litig. v. Estate of Marcos*, 25 F.3d 1467, 1475 (9th Cir. 1994); *Kadic*, 70 F.3d at 243-44. Federal immigration law relies on the Convention when deciding whether aliens may be deported to nations

that would torture them. United States Policy With Respect to the Involuntary Return of Persons in Danger of Subjection to Torture § (f), 112 Stat. 2681-822 (1998) (codified at 8 U.S.C. § 1231 (Historical and Statutory Note)). See also *Cadet v. Bulger*, 377 F.3d 1173, 1194 (11th Cir. 2004) (describing the Convention as providing "the only relevant definition of 'torture'" in the immigration context). Accordingly, we, for ATA purposes, too look to the Convention when deciding what constitutes torture according to the laws of nations. The Convention defines torture as

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Part I, Article I, G.A. Res. 39/46, U.N. GAOR, Supp. No. 51, U.N. Doc. A/39/51 (1984), reprinted in 23 I.L.M. 1027. The Torture Victim Protection Act provides a different definition. In some case, the different definitions might actually make a difference; we recall that neither Congress nor the Supreme Court has urged us to read the TVPA as narrowly as we have been directed to read the Alien Tort Act generally. See *Sosa*, 124 S. Ct. at 2761-62.

Plaintiffs allege they were (a) in the custody or physical control of the security force; (b) suffered severe, prolonged mental and physical pain or suffering; by being (c) threatened with imminent death; for the purposes of (d) punishing Plaintiffs for their labor activities. The complaint alleges that Plaintiffs Hernandez, G. Martinez, M. Martinez, and Romero all were told they would be killed that night. n9 Plaintiff Aldana and M. Martinez were filmed with a video camera and told they "would be giving their last messages." (Compl. P 48). The complaint does not mention specific threats against Plaintiff Rodriguez, nor does it say that Plaintiff Evans was told he would be killed that night. n10 But, another paragraph discusses a collective threat: taking pictures of the seven Plaintiffs, "stating that [a member of the security force] wanted a clear photo of the faces before he killed them all." (Compl. P 45). These allegations describe imminent death threats: (1) the security force was heavily armed; (2) Plaintiffs were unarmed and restrained; and (3) for many hours the security force made specific threats that Plaintiffs (for their past acts) would be killed not sometime in the future, but that very night.

In addition, Plaintiffs allege in a paragraph addressing a negligent infliction of emotional distress claim, that they "have suffered and will continue to suffer . . . extreme and severe mental anguish and emotional distress." (Compl. P 105). n11 All things considered, the acts alleged in the complaint could constitute torture -- based on intentionally inflicted emotionally pain and suffering -- under the Alien Tort Act and Torture Victim Protection Act.

Plaintiffs' allegations of intentionally inflicted physical pain and suffering do not meet the statutory elements of torture under either the Alien Tort Act or Torture Victim Protection Act, however. Much of the pleading about physical -- as opposed to mental -- torture is conclusory. For example, the complaint contains paragraphs describing some Plaintiffs as being "tortured with physical violence." (Compl. P 34). These kinds of allegations cannot overcome a motion to dismiss. See generally *Oxford Asset Mgmt., Ltd. v. Jaharis*, 297 F.3d 1182, 1188 (11th Cir. 2002) ("conclusory allegations, unwarranted deductions of facts or legal conclusions masquerading as facts will not prevent dismissal"). Furthermore, the only specified acts of physical violence we can discern from the complaint involves pushing, shoving and having one's hair pulled. These acts do not constitute severe pain or suffering.

CONCLUSION

We commend the district court for remembering that some minimal pleading standard does still exist and for that court's serious and thorough examination of the complaint. We affirm the district court's order dismissing Plaintiffs' complaint entirely, except we vacate the dismissal of Plaintiffs' claims -- under the Alien Tort Act and the Torture Victim Protection Act -- for alleged torture based on intentionally inflicted mental pain and suffering.

AFFIRMED IN PART, VACATED IN PART, REMANDED.

* Honorable Jane A. Restani, Chief Judge, United States Court of International Trade, sitting by designation.

n1 When we refer to the "complaint," we mean the third amended complaint filed by Plaintiffs on 5 February 2003. The thirty-one page, one-hundred-and-four paragraph complaint is attached as an appendix to this opinion. By the way, the order upon which this appeal is based, is an order dismissing Plaintiffs' complaint without prejudice: the district court allowed Plaintiffs a stated time in which to amend their complaint again. *Aldana v. Fresh Del Monte Produce, Inc.*, 305 F. Supp. 2d 1285, 1308 (S.D. Fla. 2003). Plaintiffs chose to appeal instead of amending the complaint a fourth time. Because Plaintiffs filed their notice of appeal before the time to amend expired, they waived the right to amend later the complaint; and the dismissal became final for appeal purposes. *Schuurman v. Motor Vessel "Betty K V"*, 798 F.2d 442, 445 (11th Cir. 1986).

n2 Plaintiffs allege that the SITRABI headquarters are one-hundred meters from the National Police office. Based on this spacial proximity, Plaintiffs conclude that "it was an absolute certainty that the National Police were aware of all events of the night."

n3 Congress enacted the Alien Tort Act in 1789. The Court determined that three offenses were actionable at that time: violation of safe conducts, infringement of the rights of ambassadors, and piracy. Sosa, 124 S. Ct. at 2761.

n4 Our conclusion differs from dicta contained in Arce v. Garcia, 400 F.3d 1340, 1345 n.2 (11th Cir. 2005)

(interpreting Sosa as limiting the Alien Tort Act to a grant of jurisdiction, not a cause of action)

N5 Paragraph fifty-five alleges that "As [Plaintiffs] walked outside [after resigning from the union], they all were able to see the National Police office, which was no more than 100 meters from the SITRABI office. It was an absolute certainty that the National Police were aware of all of the events of the night, and yet they did nothing to intervene to protect the SITRABI leaders."

n6 We stress that this litigation is at a preliminary stage that is very friendly to Plaintiffs. We cannot predict what evidence can be mustered at summary judgment (or beyond) that could support or refute this allegation from the complaint. We cannot be certain the time that the Mayor arrived on the scene. Because we must construe the complaint in Plaintiffs' favor, we accept today that he was present for the alleged acts of torture described below.

n7 The Supreme Court defines the law of nations as being determined, "where there is no treaty, and no controlling executive or legislative act or judicial decision, [by] the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is." Sosa, 124 S. Ct. at 2766-67 (citing The Paquete Habana, 175 U.S. 677, 44 L. Ed. 320, 20 S. Ct. 290, 299 (1900)).

n8

(1) the term "torture" means any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind; and

(2) mental pain or suffering refers to prolonged mental harm caused by or resulting from--
(A) the intentional infliction or threatened infliction of severe physical pain or suffering;

(B) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(C) the threat of imminent death; or

(D) the threat that another individual will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

Torture Victim Protection Act § 3(b), 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 (Historical and Statutory Notes)).

n9 The complaint alleges that members of the security force -- who were armed, and thus had ready the means to kill -- told Plaintiffs Evans and Romero that they would be killed because of their "activities on behalf of SITRABI." (Compl. P 34). In paragraph forty-five, the complaint attributes a member of the security force telling Romero that he would be burned alive. Paragraph thirty-seven describes Plaintiff M. Martinez's abduction: members of the security force told him "that they were going to kill him." Paragraph forty-three alleges a member of the security force threatened Plaintiff G. Martinez by stating: "You won't mess with Bandegua after we cut your balls off and hang you!" The threat against Plaintiff Hernandez is contained in paragraph forty: a member of the security force "stepped forward and put a gun to Plaintiff Hernandez's head, threatening 'I'll make you smile.'"

n10 Paragraph thirty-nine addresses Rodriguez's entry to the SITRABI headquarters: "He was ordered at gunpoint by a leader of the security force . . . to get out of his car and go into the SITRABI office."

n11 The placement of the paragraph in another count is unimportant to our review of a district court's order dismissing a complaint under Rule 12(b) of the Federal Rules of Civil Procedure. We read the complaint as a whole. Magluta v. Samples, 375 F.3d 1269, 1274-75 (11th Cir. 2004). In addition, a formulaic misstep by counsel is not fatal under the notice pleading standard (where fair notice is all that is required) of Federal Rule of Civil Procedure 8(a). See generally, Swierkiewicz v. Sorema,

N.A., 534 U.S. 506, 122 S. Ct. 992, 998, 999, 152 L. Ed. 2d 1 (2002) (interpreting Rule 8(a) as focusing the "litigation on the merits of a claim"). See also 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1286 (3d ed. 2004) (describing a pleading as judged "by the quality of its substance rather than according to its form or label and, if possible, it will be construed to give effect to all its averments"). Del Monte cannot say that it did not receive fair notice of the torture claim just because the language about lasting mental trauma was placed in another section of the complaint.

APPENDIX

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 01-3399-CIV-MORENO/DUBE

ANGEL ENRIQUE VILLEDA ALDANA, 65341/2 Bell Gardens, CA, 90201; JORGE AGUSTIN PALMA ROMERO, 10930 S. Borin Ave., Lennox, CA 90304; OSCAR LEONEL GUERRA EVANS, 3832 Royal Crest St., Apt. 4, Las Vegas, NE. 89119; LYIONHEL McINTOSCH RODRIGUEZ, 3940 San Andrews Pl., Los Angeles, CA 90062; MAREL MARTINEZ, 4412 Lockwood Ave., Los Angeles, CA 90029; GUMERZINDO LOYO MARTINEZ, 842 S. Normandie Ave., Apt. 20, Los Angeles, CA 90005; and RIGOBERTO AVAYERO HERNANDEZ; 842 S. Normandie Ave., Apt. 20, Los Angeles, CA 90005, Plaintiffs, v. FRESH DEL MONTE PRODUCE, INC., C/O 800 Douglas Road, North Tower, 12 Floor, Coral

Gables, FL 33134, DEL MONTE FRESH PRODUCE COMPANY, 800 Douglas Road, North Tower, 12th Floor, Coral Gables, FL 33134, and COMPANIA DE DESARROLLO, BANANERO DE GUATEMALA, S.A. (BANDEGUA), C/O 800 Douglas Road, North Tower, 12th Floor Coral Gables, FL 33134, Defendants.

THIRD AMENDED COMPLAINT FOR EQUITABLE RELIEF AND DAMAGES; JURY TRIAL DEMANDED

February 5, 2003, Filed

I. NATURE OF THE ACTION

1. Plaintiffs Angel Enrique Villeda Aldana, Jorge Agustin Palma Romero, Oscar Leonel Guerra Evans, Lyionhel McIntosch Rodriguez, Marel Martinez, Gumerzindo Loyo Martinez and Rigoberto Alvayero Hernandez (hereafter referred to as "Plaintiffs" unless otherwise specified) bring this Complaint for equitable relief and for damages to remedy the injury to their persons caused by the wrongful conduct of the Defendants Fresh Del Monte Produce, Inc. ("Del Monte, Inc."), Del Monte Fresh Produce Company ("Del Monte Fresh"), and Compania de Desarrollo Banaero de Guatemala, S.A. ("Bandegua") (hereinafter collectively referred to as "Del Monte" or Defendants unless otherwise specified).

2. The claims in this action arise from Defendants' wrongful actions in connection with their banana production operations in Guatemala, which are conducted by Defendant Bandegua, a wholly-owned subsidiary of Defendant Del Monte, Inc. The individual

Plaintiffs have been subjected to serious human rights abuses, including kidnapping, unlawful detention, and torture in violation of the Alien Tort Claims Act (ATCA), 28 U.S.C. § 1350, the Torture Victims Protection Act (TVPA), international human rights law, and the common tort law of the state of Florida. Further, Defendants engaged in a conspiracy to cause physical and mental harm to Plaintiffs in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 et seq.

3. Plaintiffs do not have access to an independent or functioning legal system within Guatemala to raise their complaints. They made every effort to utilize that system, but the perpetrators of the illegal actions against them remain free and at large in Guatemala, and have made ongoing threats of death to the Plaintiffs. The Plaintiffs have sought refuge for themselves and their families in the United States. Having arrived in the United States in March 24, 2001, Plaintiffs Angel Enrique Villeda Aldana, Jorge Agustin Palma Romero, Oscar Leonel Guerra Evans, Lyionhel McIntosch Rodriguez and Marel Martinez have pursued the claims set forth herein within a reasonable time of gaining access to the courts of the United States. Similarly, Plaintiffs Gumerzindo Loyo Martinez and Rigoberto Alvayero Hernandez, who arrived in early 2002, have pursued their claim within a reasonable time of gaining access to the courts of the United States.

II. JURISDICTION AND VENUE

4. This Court has federal question jurisdiction pursuant to 28 U.S.C. § 1331, the ATCA and the TVPA, 28 U.S.C. § 1350; for the alleged violations of international

human rights law. Federal question jurisdiction is further based on violations of RICO, 18 U.S.C. § 1961 et seq. Supplemental jurisdiction exists over the state law causes of action pursuant to 28 U.S.C. § 1367. Federal jurisdiction also exists under 28 U.S.C. § 1332 based on diversity. Plaintiffs Angel Enrique Villeda Aldana, Lyionhel McIntosh Rodriguez, Marel Martinez, Gumerzindo Loyo Martinez and Rigoberto Alvayero Hernandez reside in Los Angeles, California. Plaintiffs Jorge Agustin Palma Romero and Oscar Leonel Guerra Evans reside in Las Vegas, Nevada. Defendant Del Monte, Inc. is a corporation incorporated in the Cayman Islands with a principle place of business in Coral Gables, Florida. Defendant Del Monte Fresh is a corporation incorporated in Delaware with a principle place of business also in Coral Gables, Florida. Defendant Bandegua is, upon information and belief, a corporation incorporated under the laws of Guatemala, with a principle place of business in Coral Gables, Florida.

5. Venue properly lies in this Judicial District pursuant to 28 U.S.C. § 1391(b) and (c).

III. PARTIES

Plaintiffs

6. Plaintiff Angel Enrique Villeda Aldana is a citizen of Guatemala residing in Los Angeles, California. He brings this action for equitable relief and for damages to remedy the injuries to his person caused by the wrongful conduct of the Defendants, as more fully set forth herein.

7. Plaintiff Jorge Agustin Palma Romero is a citizen of Guatemala residing in Las Vegas, Nevada. He brings this action for equitable relief and for damages to remedy the injuries to his person caused by the wrongful conduct of the Defendants, as more fully set forth herein.

8. Plaintiff Oscar Leonel Guerra Evans is a citizen of Guatemala residing in Las Vegas, Nevada. He brings this action for equitable relief and for damages to remedy the injuries to his person caused by the wrongful conduct of the Defendants, as more fully set forth herein.

9. Plaintiff Lyionhel McIntosch Rodriguez is a citizen of Guatemala residing in Los Angeles, California. He brings this action for equitable relief and for damages to remedy the injuries to his person caused by the wrongful conduct of the Defendants, as more fully set forth herein.

10. Plaintiff Marel Martinez is a citizen of Guatemala residing in Los Angeles, California. He brings this action for equitable relief and for damages to remedy the injuries to his person caused by the wrongful conduct of the Defendants, as more fully set forth herein.

11. Plaintiff Gumerzindo Loyo Martinez is a citizen of Guatemala residing in Los Angeles, California. He brings this action for equitable relief and for damages to remedy the injuries to his person caused by the wrongful conduct of the Defendants, as more fully set forth herein.

12. Plaintiff Rigoberto Alvayero Hernandez is a citizen of Guatemala residing in Los Angeles, California. He brings this action for equitable relief and for damages to remedy the injuries to his person caused by the wrongful conduct of the Defendants, as more fully set forth herein.

Defendants

13. Defendant Del Monte, Inc. is a for-profit company which distributes fresh produce throughout the United States and the world, specifically including within the state of Florida. Its principal place of business is located at 800 Douglas Road, North Tower, 12th Floor, Coral Gables, Florida 33134. Defendant Del Monte, Inc. has exclusive rights to market fresh produce under the Del Monte brand name.

14. Upon information and belief, Defendant Del Monte, Inc. owns, and through its Board of Directors, controls the family of companies operating under the Fresh Del Monte Produce name, through its Florida office located at 800 Douglas Road, North Tower, 12th Floor, Coral Gables, Florida 33134. According to the 20-F Report filed by Defendant Del Monte, Inc. on December 29, 2000 with the Securities and Exchange Commission, and other public sources, Defendant Del Monte, Inc. controls, manages or supervises all aspect of production, distribution and marketing of its fresh produces on a worldwide basis.

15. Defendant Del Monte Fresh is a Delaware company with a principal place of business located at 800 Douglas Road, North Tower, 12th Floor, Coral Gables, Florida

33134. Del Monte Fresh is a wholly-owned subsidiary of Defendant Del Monte, Inc. and its address serves as Del Monte, Inc.'s principle executive office. Upon information and belief, Del Monte Fresh is under the direct supervision and control of its parent company, Del Monte, Inc.

16. Defendant Bandegua is also a wholly-owned subsidiary of Defendant Del Monte, Inc., and is responsible, under the direct supervision and control of Defendant Del Monte, Inc. and/or Defendant Del Monte Fresh, for the production of bananas for distribution and sale by Defendant Del Monte, Inc.

17. Defendant Del Monte, Inc. for the purpose of attempting to shield itself from liability or responsibility for wrongful acts committed in furtherance of its business activities, created, or caused to have created, several wholly-owned subsidiaries, divisions and/or affiliated companies. These entities include, but are not limited to, Defendants Del Monte Fresh and Bandegua.

18. Defendant Del Monte, Inc. is fully liable for its own acts and the acts of any subsidiaries, affiliates, divisions or other entities directly or indirectly under its ownership and control, including Defendants Del Monte Fresh and Bandegua. Any such subsidiaries, affiliates, divisions or other entities are alter egos of Defendant Del Monte, Inc. or, alternatively, are in an agency relationship with it. Further, Defendant Del Monte, Inc. is vicariously liable under the doctrine of *respondeat superior* for the acts or omissions of any subsidiaries, affiliates, divisions or other entities under its ownership and control.

19. Upon information and belief, these subsidiaries including Del Monte Fresh and Bandegua were created for the sole purpose of achieving Del Monte, Inc.'s objectives with respect to the production, marketing, sale, and distribution of its fruit products, and are under the direct managerial and financial control of Del Monte, Inc. to the extent that such subsidiaries have no or insignificant financial assets of their own.

20. Regardless of whether Defendant Del Monte Fresh is found to be an alter ego or agent of Defendant Del Monte, Inc., Defendant Del Monte Fresh is fully liable for its own acts and the acts of any subsidiaries, affiliates, divisions or other entities directly or indirectly under its ownership and control, including Defendant Bandegua. Any such subsidiaries, affiliates, divisions or other entities are alter egos of Defendant Del Monte Fresh or, alternatively, are in an agency relationship with it. Further, Defendant Del Monte Fresh is vicariously liable under the doctrine of *respondeat superior* for the acts or omissions of any subsidiaries, affiliates, divisions or other entities under its ownership and control, including those of Defendant Bandegua.

21. Regardless, of whether Defendant Bandegua is found to be an alter ego or agent of Defendants Del Monte, Inc. and/or Del Monte Fresh, Defendant Bandegua is liable for any and all wrongful acts done by it or on its behalf by any of its agents or employees.

IV. BACKGROUND FACTUAL ALLEGATIONS

22. Defendant Del Monte, Inc., is one of the world's largest producers and distributors of bananas. One of

its major sources of bananas is Guatemala. Through its wholly-owned subsidiaries, Defendants Del Monte Fresh and Bandegua, Del Monte, Inc. owns, leases and/or operates banana plantations in Guatemala. Among the plantations it owns and operates in Guatemala is the Zaculeu Lanquin Arapahoe Plantation in the Bobos District Municipality of Morales Izabal (hereinafter referred to as the "Bobos plantation").

23. In September and October, 1999, when the wrongful act alleged herein occurred, the Bobos plantation was owned and operated by Bandegua through the General Manager employed by Bandegua, Jorge Arturo Osborne Escalante.

24. The workers at the Bobos plantation were represented by SITRABI, a national trade union of plantation workers affiliated to the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco, and Allied Workers' Associations (hereinafter referred to as "IUF"). Plaintiffs, as is described more fully below fully below, were all officers of SITRABI's union at the Bobos plantation.

25. Guatemala is widely known as a county that is struggling to maintain peace and reduce violence and armed conflict. However, the country also officially permits and regulates the use of private, armed security forces. The Ministry of Interior has specific jurisdiction to regulate these private security forces, and commonly allows them to operate.

26. Defendant Del Monte, Inc. and its wholly owned subsidiary, Bandegua, were engaged in negotiations with SITRABI for a new collective bargaining

agreement covering the workers at the Bobos plantation. Defendant Del Monte, Inc. through its regional agents, including but not limited to Defendant Del Monte Fresh, was directly involved in these negotiations. Without legal justification, and in violation of the operative collective bargaining agreement, Defendants Del Monte, Inc., Del Monte Fresh, and Bandegua terminated 918 workers at the Bobos plantations, all of whom were members of SITRABI.

27. In response to the illegal termination of 918 of its members who were employed at the Bobos plantation, SITRABI filed an appropriate complaint in the Labor Court Guatemala and also continued in good faith its negotiations with Defendants.

V. INJURIES AND HARM SUFFERED BY THE PLAINTIFFS

28. On or before October 13, 1999, Defendants Del Monte, Inc., Del Monte Fresh and Bandegua hired or otherwise created an agency relationship with an armed and organized security force (hereinafter referred to as the "security force") to use violence to intimidate the SITRABI leadership in order to affect the outcome of the ongoing collective bargaining negotiations and the associated labor disputes concerning the workforce of the Bobos plantation. This security force was given specific direction by employees or agents of Del Monte, Inc., Del Monte Fresh and/or Bandegua.

29. The security force was heavily armed and was permitted to operate openly due to the provisions and

practices pursuant to the law of Guatemala under which the Ministry of Interior regulates the creation and use of private, armed security forces. Moreover, public officials, at the urging of Defendants and/or their agents, intentionally failed to take action in order to permit the violence to occur. Further, various public officials were part of the security force.

30. On the afternoon of October 13, 1999, the security force met with employees and/or agents of Del Monte, Inc., Del Monte Fresh and/or Bandegua to plan violent action against the Plaintiffs and other SITRABI leaders. This meeting occurred at a restaurant in the Municipality of Morales Izabal. Among the Del Monte employees present was the Director of Operations, Teodoro Jimenez Falla, who, on information and belief, is still employed by Del Monte and working in Brazil after fleeing Guatemala to avoid criminal prosecution for his wrongful acts described herein. Also present and actively participating in planning the violence was Carlos Enrique Hernandez, who was head of security for Del Monte's operations in Guatemala. As is described below, Carlos Enrique Hernandez was present during the violent acts that followed the planning session described herein, and was relaying information as it occurred to allow his superiors at Del Monte to coordinate the steps of the plan to use violence to force the resignation of the SITRABI leaders from the union and from the company. On information and belief, the Bandegua General Manager, Jorge Arturo Osborne Escalante, was also present at this meeting, or it occurred at his direction and with his coordination.

31. Based on information and belief, the security force was represented at the meeting by its leaders, Obdulio Mendoza Matta, Edvin Mendoza Mata, Carlos Castro Garcies, and Carlos Regil Beker. At least two of these leaders, Obdulio Mendoza Matta and Carlos Castro Garcies, were contractors for Del Monte, Inc., Del Monte Fresh and/or Bandegua, and performed regular services in Guatemala as agents for the banana plantations owned by the Defendants.

32. The result of the meeting was a specific plan and agreement between the security force and Del Monte, Inc., Del Monte Fresh and/or Bandegua pursuant to which the security force would capture, kidnap and terrorize the Plaintiffs in order to break the SITRABI union, eliminate its experienced leadership, and gain a significant advantage in the ongoing collective bargaining negotiations and the associated labor disputes concerning the workforce of the Bobos plantation. This plan was in furtherance of the business activities and interests of Defendants Del Monte, Inc., Del Monte Fresh, and/or Bandegua, and constituted an express conspiracy to commit violent acts against the Plaintiffs.

33. On October 13, 1999, at 5:45 p.m. the security force, which was a gang of over 200 heavily armed men, came to the SITRABI headquarters in the Municipality of Morales, Izabal to carry out and implement the conspiracy, described in more detail below, on behalf of, and under the direction and control of, Defendants Del Monte, Inc., Del Monte Fresh, and/or Bandegua.

34. Plaintiffs Jorge Agustin Palma Romero and Oscar Leonel Guerra Evans were in the SITRABI office when

the security force arrived. They were both detained unlawfully at gunpoint by the security force, and they were tortured with physical violence and the threat of death. The security force kept multiple weapons pointed at them, frequently jabbing them with the weapons causing great physical pain and mental anguish. The aggressors threatened repeatedly that the Plaintiffs would be killed because of their activities on behalf of SITRABI.

35. Plaintiff Oscar Leonel Guerra Evans was eventually taken to a room within the SITRABI office and left with a subgroup of the security force. He was constantly tortured with guns and threats of death while he was detained against his will.

36. Plaintiff Jorge Agustin Palma Romero was forcibly detained and then removed from the SITRABI office at gunpoint by several leaders of the security force, including, but not limited to, Obdulio Mendoza Matta, Edvin Mendoza Mara, Carlos Castro Garcies, and Carlos Regil Beker. He was kidnapped by the security force in a car that belonged to SITRABI. He was ordered at gunpoint to show the security force where another of the Plaintiffs, and a leader of SITRABI, Plaintiff Marel Martinez, lived. During the drive, a leader of the security force, Obdulio Mendoza Matta, said to Plaintiff Jorge Agustin Palma Romero, while holding a gun to his head, that they were going to kill him and his body would be rotten by the time the human rights people heard that he is dead.

37. The security force arrived at the home of Plaintiff Marel Martinez, and in front of his wife and children, abducted him at gunpoint. They shoved him with gun

barrels, smashed his cell phone, and told him that they were going to kill him, all while his family observed helplessly.

38. The security force took Plaintiff Marel Martinez and Plaintiff Jorge Agustin Palma Romero back to the SITRABI office, all the while again torturing them with guns and threats that they were going to be killed in a brutal and grotesque way. When they arrived back at the SITRABI office, the security force took them inside and, at gunpoint, forced Plaintiff Marel Martinez to telephone Plaintiff Angel Enrique Villeda Aldana, another SITRABI leader, and tell him he had to come at once to the SITRABI office to sort out a problem with Bandegua and the Bobos Chamber of Commerce. Marel Martinez had a gun to his head the entire time he made the call, and he was told that if he warned or otherwise failed to deliver the message to Plaintiff Angel Enrique Villeda Aldana, he would be killed instantly. The security force also forced Marel Martinez to call other SITRABI leaders and summon them to the office. While waiting for the other leaders to arrive, Plaintiffs Jorge Agustin Palma Romero, Oscar Leonel Guerra Evans, and Marel Martinez were subjected to ongoing torture as the security force members pointed guns at them and described how they were going to be killed.

39. At some point while the security force was waiting for Plaintiff Angel Enrique Villeda Aldana to arrive, Plaintiff Lyionhel McIntosch Rodriguez, another SITRABI leader, arrived at the SITRABI office. He was ordered at gunpoint by a leader of the security force, Obdulio Mendoza Matta, to get out of his car and go into the SITRABI office. Shortly thereafter,

Plaintiff Angel Enrique Villeda Aldana arrived at the office and was likewise taken inside the SITRABI office at gunpoint.

40. Plaintiff Rigoberto Hernandez was at home when he received the call from Marel Martinez. He responded immediately and proceeded to the SITRABI offices. When Plaintiff Hernandez arrived at the union offices, he smiled upon seeing his colleague, Marel Martinez. Obdulio Mendoza Matta then stepped forward and put a gun to Plaintiff Hernandez's head, threatening "I'll make you smile."

41. Plaintiff Gumerzindo Martinez was at home when he received a call from Marel Martinez; shortly thereafter, he boarded a bus heading in the direction of the SITRABI offices.

42. The bus, which contained about thirty five plantation workers and fifteen SITRABI leaders, was stopped in front of the SITRABI offices. Obdulio Mendoza Matta boarded the bus and explained to the passengers that he did not have a dispute with the workers but only the SITRABI leadership. SITRABI leaders, including Gumerzindo Martinez, were removed from the bus and led into the SITRABI offices, where they were forcibly held with the other leaders.

43. At this time, Obdulio Mendoza Matta jabbed a gun into Plaintiff Gumerzindo Martinez and told him that he was going to die. Obdulio Mendoza Matta then threatened Gumerzindo Martinez, exclaiming "Now you will find out who we really are. You won't mess with Bandegua after we cut your balls off and hang you!"

44. Once the seven SITRABI leaders, the Plaintiffs herein, were present, the security force took them, and other SITRABI members who were present in the office, to the auditorium of the union office. A leader of the security force, Carlos Castro Garcias, who claimed to be the President of the Chamber of Commerce for the Municipality of Morales, Izabal, told the Plaintiffs that they were responsible for the declining business in the area. Further, he said that if Del Monte abandons the Bobos plantation and the plantations in the rest of the country, it would be their fault. He continued that the security force would not allow that to happen. At this point, another leader of the security force, Obdulio Mendoza Matta, interrupted to say that there had been enough talk and it was time to kill the SITRABI leaders, including the seven Plaintiffs herein.

45. Obdulio Mendoza Matta then ordered his men to "get the AK-47s." He then used a Polaroid camera and took pictures of the seven Plaintiffs, stating that he wanted a clear photo of the faces before he killed them all. The five Plaintiffs were shoved and jabbed with guns while the members of the security forces were discussing what to do next. The Plaintiffs all believed reasonably that they were going to be killed by the out of control mob. Another member of the security force, Mario Benildo Alvarez, grabbed Plaintiff Jorge Agustin Palma Romero by the hair and shouted, "Let's start with this one. Let's burn him alive. He's big and tall, let's kill Jorge." Obdulio Mendoza Matta then came from behind and hit Mr. Romero in the back, and said, "Do you want to see who wants to bum you alive you son of a bitch?"

46. The security force had become an unruly mob and the Plaintiffs were pushed and shoved with guns as the aggressors competed to shout what should be done to kill them. All of the Plaintiffs sustained injuries and suffered severe trauma as they waited to be brutally killed by the mob.

47. At some point in the confusion, the candidate for Mayor of Morales District, Manuel Sosa Castaneda, who is now the current Mayor of Morales Municipality, arrived. He was with the security force and joined in the mob action. Thereafter, the security force reached a consensus that the two main leaders of SITRABI, Plaintiffs Angel Enrique Villeda Aldana and Marel Martinez, would be taken to a radio station owned by a leader of the security force, Carlos Castro Garcias, where they would be forced to denounce the union. Accompanied by Carlos Castro Garcias, Israel Vargas, who was Mayor of Morales District at the time of the events herein, and several other armed aggressors, Plaintiffs Angel Enrique Villeda Aldana and Marel Martinez were taken by force, at gunpoint, and against their wills, to the radio station. The remaining Plaintiffs were guarded by three gunmen who told them that if anyone moved, they would be killed.

48. On the way to the radio station, with guns to their heads and bodies, Plaintiffs Angel Enrique Villeda Aldana and Marel Martinez were further tortured and threatened with death. Carlos Castro Garcias took out a video camera and filmed much of the scene and taunted them, saying "they were not celebrities and would be giving their last messages."

49. At the radio station, Plaintiffs Angel Enrique Villeda Aldana and Marel Martinez were forced at gunpoint to make an announcement over the radio that the labor dispute with Del Monte was over, the workers should return to work, the workers who had been discharged from Bobos should get the money owed them and go elsewhere for work, and that the leaders of SITRABI would resign their posts.

50. When the announcement was completed, Plaintiffs Angel Enrique Villeda Aldana and Marel Martinez were taken back at gunpoint to the SITRABI office. The seven Plaintiffs herein, among others, were then gathered in an office and were further tortured at gunpoint with threats of brutal death.

51. A lawyer from the area, Jorge Salguero, was brought in, and another man, Rufino Sosa, joined to type the lawyer's dictation. Another lawyer, who was clearly with the security force, was telling the other lawyer, Salguero, what to do. Two video cameras controlled by the security force were recording the events. A fax arrived in the office. On information and belief, the fax was sent by officials of Del Monte, Inc., Del Monte Fresh, and/or Bandegua. It was a model resignation and release form. The lawyers directed the typist who prepared a resignation and release letter for the seven Plaintiffs and the four additional SITRABI leaders. They were all forced, at gunpoint, to sign the resignation letters. During all of these events, the Chief of Security for Del Monte, Inc., Del Monte Fresh, and/or Bandegua, Carlos Enrique Hernandez Diaz, was present and was communicating by walkie talkie to persons believed to be management staff of Del Monte.

52. Once the letters were signed, then again unruly calls from the mob of the security force were made to kill the Plaintiffs. Manuel Sosa Castaneda, a leader of the security force and now the Mayor of Morales Municipality, made a speech mocking the Plaintiffs and thanking them for their public service of resigning from Del Monte. He had been one of the armed aggressors throughout the events of the evening.

53. Plaintiffs Marel Martinez and Jorge Agustin Palma Romero made statements to the mob to the effect that "you have what you wanted, now please let us go."

54. Obdulio Mendoza Matta, a leader of the security force, told the Plaintiffs that they had better leave the area or he would find them and kill them. He further stated that even if they went to Mexico, he would find them. He pounded Plaintiffs Angel Enrique Villeda Aldana and Jorge Agustin Palma Romero in the chest as he was saying this.

55. Plaintiffs were released from their detention around 2 a.m. on October 14, 1999. As they walked outside, they all were able to see the National Police office, which was no more than 100 meters from the SITRABI office. It was an absolute certainty that the National Police were aware of all of the events of the night, and yet they did nothing to intervene to protect the SITRABI leaders. Positive that they would not be safe if they remained in the area, the Plaintiffs, except Gumerzindo Martinez, gathered their families and fled to Guatemala City where they sought police protection.

56. Plaintiff Gumerzindo Martinez, who was forced to remain in the area of the Bobos plantation due to a

motorcycle accident, ran into Obdulio Mendoza Matta at a gas station four days later. Obdulio Mendoza Matta again told Plaintiff Gumerzindo Martinez that he was to leave the country immediately or face certain death. He thereafter fled the area and hid in the countryside until he managed to travel to Guatemala City.

57. At the conclusion of the events of the evening of October 13 and the early morning of October 14, 1999, Obdulio Mendoza Matta had custody of the resignation letters of the five Plaintiffs. The next day, in response to an inquiry from the Ministry of Labor, the Bandegua General Manager, Jorge Arturo Osborne Escalante, asserted that he had the "voluntary resignations" of the SITRABI leaders in his possession. Mr. Escalante made this statement at a meeting with the Ministry of Labor and at a separate meeting with the Public Ministry. The Plaintiffs were present in the meeting with the Ministry of Labor.

58. Within weeks of the events of October 13 and 14, two of the main leaders of the security force, Obdulio Mendoza Matta and Carlos Castro Garcias, who had been contractors and agents for Del Monte, Inc., Del Monte Fresh, and/or Bandegua, were rewarded by Del Monte, Inc. for their leadership roles in the violence described herein with favorable long term leases and became the administrators for banana plantations in Guatemala that Del Monte, Inc. had decided not to operate directly any longer.

59. Shortly after the events described herein, senior management for Del Monte, in response to demands made by the IUF, promised to remove Obdulio Mendoza Matta and Carlos Castro Garcias, and others

who had been involved in the violence of October 13 and 14, from management positions at any Del Monte-controlled plantation in Guatemala. Further, acknowledging the ongoing danger to their lives and the lives of their families, Del Monte promised to assist the five Plaintiffs to get out of Guatemala. Ultimately, Del Monte provided $ 50,000 to the IUF dedicated to covering the costs of relocating Plaintiffs Angel Enrique Villeda Aldana, Jorge Agustin Palma Romero, Oscar Leonel Guerra Evans, Lyionhel McIntosch Rodriguez and Marel Martinez and their families. These funds were for travel costs only, and these five Plaintiffs in no way indicated that these funds applied to settle any claims that could be brought against Del Monte for its acknowledged direct role in the events of October 13 and 14, 1999. Plaintiffs Gumerzindo Martinez and Rigoberto Hernandez received no such funds.

60. In March 2001, Plaintiffs Angel Enrique Villeda Aldana, Jorge Agustin Palma Romero, Oscar Leonel Guerra Evans, Lyionhel McIntosch Rodriguez and Marel Martinez, after being forced to live in hiding and in constant fear of their lives, and the lives of their family members, for 17 months, were relocated to the United States with the direct intervention of the U.S. embassy in Guatemala. Plaintiffs Gumerzindo Martinez and Rigoberto Hernandez were not able to flee Guatemala until almost a year later, in early 2002.

VI. DEFENDANTS' VIOLATIONS OF LAW

61. Defendants' actions violate, and Plaintiffs' causes of action arise from, the following laws, agreements, conventions, resolutions and treaties, which constitute

specific examples of the applicable law of nations or customary international law:

(a) Alien Tort Claims Act, 28 U.S.C. § 1350;

(b) Torture Victim Protection Act, 28 U.S.C. § 1350;

(c) Common law of the United States of America;

(d) United Nations Charter, 59 Stat. 1031, 3 Bevans 1153 (1945);

(e) Universal Declaration of Human Rights, G.A. Res. 217A(iii), U.N. Doc. A/810 (1948);

(f) International Covenant on Civil and Political Rights, G.A. Res. 2220A(xxi), 21 U.N. Doc., GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966);

(g) Convention Against Torture and Other. Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, 39 U.N. Doc., GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)(ratified 10/28/98);

(h) Declaration on the Protection of All Persons From Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 3452, 30 U.N. Doc., GAOR Supp. (No. 34) at 91, U.N. Doc. A/10034 (1976);

(i) Vienna Declaration and Programme of Action (World Conference on Human Rights, 1993);

(j) International Labor Organization Conventions 87

and 98, which protect the fundamental rights to associate and organize; and

(k) Statutes and common law of the State of Florida, including but not limited to, assault and battery, false imprisonment, kidnapping, negligence, recklessness, intentional infliction of emotional distress, and negligent infliction of emotional distress.

VII. DEFENDANTS' VICARIOUS LIABILITY

62. Defendant Del Monte, Inc. controls and operates a number of wholly owned subsidiaries, including, but not limited to, Defendants Del Monte Fresh and Bandegua. As the owner of its wholly owned subsidiaries, Defendant Del Monte, Inc. is jointly and severally liable for all of the tortious actions committed by any of its subsidiaries when such subsidiaries were acting in concert with any other person or entity in furtherance of Del Monte, Inc.'s business interests and activities. All of the wrongful acts alleged herein were committed by individuals who were acting within the course and scope of a business relationship with Del Monte, Inc. with the advance knowledge, acquiescence or subsequent ratification of Del Monte, Inc.

63. Defendant Del Monte, Inc. acting by and through its subsidiaries Defendant Del Monte Fresh and/or Bandegua, hired, contracted with, or otherwise retained as agents the individuals who committed the violent acts against Plaintiffs, as described herein. The individuals who committed the violent acts against Plaintiffs were acting as agents of Del Monte, Inc., Del Monte Fresh, and/or Bandegua, and committed the tortious actions described in this Complaint in

connection with and in furtherance of Del Monte, Inc.'s business interests and activities. In committing these tortious actions, the individual agents were acting within the course and scope of the agency relationship with Del Monte, Inc. with Del Monte, Inc.'s advance knowledge, acquiescence or subsequent ratification. Defendant Del Monte, Inc. is therefore vicariously liable for all of the tortious actions committed by its agents done in connection with and in furtherance of its business interests and activities in Guatemala as described herein.

64. With respect to all of the causes of action described below, the harm to Plaintiffs was either caused directly by the acts or omissions of Defendants or was caused by the acts or omissions of Defendants' wholly owned subsidiaries, making Defendants jointly and severally liable, or by the acts or omissions of Defendants' agents, making Defendants vicariously liable.

VIII. CAUSES OF ACTION

First Cause of Action

The Alien Tort Claims Act, 28 U.S.C. § 1350

For Torture, Kidnapping,

Unlawful Detention, and Crimes Against Humanity

65. Plaintiffs incorporate by reference paragraphs 1 through 64 of this Complaint as if set forth herein.

66. Defendants' acts and omissions of intentionally and tortiously hiring and directing its employees and/or

agents to kidnap, unlawfully detain, torture, and cruelly threaten with death some or all of the Plaintiffs herein resulted in serious human rights abuses against all Plaintiffs. These acts violate the law of nations, customary international law, and worldwide industry standards and practices, including, but not limited to, the specific laws, agreements, conventions, resolutions and treaties listed in paragraph 61, *supra*. The acts described herein are actionable under the ATCA, and, if such a showing is required, were done with the complicity of state actors. In acting together with its agent, the security force permitted to exist and openly operate under the laws of Guatemala, and assisted by government officials of the Bobos District, Defendants acted under color of law in violating each of the applicable laws, agreements, conventions, resolutions and treaties listed in paragraph 61, *supra*. Further, the Government of Guatemala fails to enforce its laws that would prevent or remedy the violations alleged herein.

67. Plaintiffs were all subjected to being physically attacked, threatened constantly with death and serious bodily injury while being held captive at gunpoint, and other forms of brutality and cruelty. These acts were inflicted intentionally and with malice to cause Plaintiffs severe mental and physical pain and suffering, and to have the lasting effect of forever causing Plaintiffs to live in fear of being subjected to similar acts. These acts amounted to torture and violate the law of nations, customary international law, and worldwide industry standards and practices, including, but not limited to, the specific laws, agreements, conventions, resolutions and treaties listed in paragraph 61, *supra*.

68. All of the Plaintiffs were forcibly captured and detained by employees and/or agents of Defendants, and were held against their will for a lengthy period of time. These removals and detentions were done intentionally and with malice to cause Plaintiffs severe mental and physical pain and suffering. These acts amounted to kidnapping and unlawful detention and violate the law of nations, customary international law, and worldwide industry standards and practices, including, but not limited to, the specific laws, agreements, conventions, resolutions and treaties listed in paragraph 61, *supra*.

69. Defendants committed, through their employees and/or agents acts that had the intent and the effect of grossly humiliating and debasing all of the Plaintiffs, forcing them to act against their will and conscience, inciting fear and anguish, and breaking their physical and/or moral resistance. Plaintiffs were placed in great fear for their lives and forced to suffer severe physical and psychological abuse and agony. The acts described herein constitute cruel, inhuman or degrading treatment in violation of the law of nations, customary international law, and worldwide industry standards and practices, including, but not limited to, the specific laws, agreements, conventions, resolutions and treaties listed in paragraph 61, *supra*.

70. Defendants' conduct in violation of the law of nations, customary international law, and worldwide industry standards and practices, including, but not limited to, the specific laws, agreements, conventions, resolutions and treaties listed in paragraph 61, *supra*. has caused Plaintiffs significant injury. Defendants are jointly and severally liable for the acts of any and all

subsidiaries that are in violation of the law of nations, customary international law, and worldwide industry standards and practices, including, but not limited to, the specific laws, agreements, conventions, resolutions and treaties listed in paragraph 61, *supra*. Defendants are also vicariously liable for any violations of their employees or agents of the law of nations, customary international law, and worldwide industry standards and practices, including, but not limited to, the specific laws, agreements, conventions, resolutions and treaties listed in paragraph 61, *supra*. Plaintiffs are entitled to injunctive relief and to recover compensatory and punitive damages in amounts to be ascertained at trial.

Second Cause of Action

The Torture Victim Protection Act, 28 U.S.C. § 1350

For Torture and Extrajudicial Killing

71. Plaintiffs incorporate by reference paragraphs 1 through 70 of this Complaint as if set forth herein.

72. Defendants' acts and omissions of intentionally and tortiously hiring and directing its employees and/or agents to torture the Plaintiffs and threaten with them with death were inflicted intentionally and with malice to cause Plaintiffs severe mental and physical pain and suffering. These acts amounted to torture for purposes of the TVPA, violate the law of nations, customary international law, and worldwide industry standards and practices, including, but not limited to, the specific laws, agreements, conventions, resolutions and treaties listed in paragraph 61, *supra*. In addition, that Defendants employees and/or agents threatened Plaintiffs with extrajudicial killing, and created a

concrete fear in Plaintiffs that they would be killed, is actionable as an attempted extrajudicial killing under the TVPA. In acting together with its agent, the security force permitted to exist and openly operate under the laws of Guatemala, and assisted by the government officials of the Municipality of Morales Izabal, Defendants acted under color of law in violating each of the applicable laws, agreements, conventions, resolutions and treaties listed in paragraph 61, *supra*. Further, the Government of Guatemala fails to enforce its laws that would prevent or remedy the violations alleged herein.

73. Defendants' conduct in violation of the law of nations, customary international law, and worldwide industry standards and practices, including, but not limited to, the specific laws, agreements, conventions, resolutions and treaties listed in paragraph 61, *supra*, has caused Plaintiffs significant injury. Defendants are jointly and severally liable for the acts of any subsidiaries that are in violation of the law of nations, customary international law, and worldwide industry standards and practices, including, but not limited to, the specific laws, agreements, conventions, resolutions and treaties listed in paragraph 61, *supra*. Defendants are also vicariously liable for any violations of their employees or agents of the law of nations, customary international law, and worldwide industry standards and practices, including, but not limited to, the specific laws, agreements, conventions, resolutions and treaties listed in paragraph 61, *supra*. Plaintiffs are entitled to injunctive relief and to recover compensatory and punitive damages in amounts to be ascertained at trial.

Third Cause of Action

The Alien Tort Claims Act, 28 U.S.C. § 1350

For Denial of Fundamental Rights to Associate and Organize

74. Plaintiffs incorporate by reference paragraphs 1 through 73 of this Complaint as if set forth herein.

75. Defendants committed, or acted in concert to commit, or Defendants' co-venturers or agents committed violent acts against Plaintiffs, described fully in the preceding paragraphs. This violence was intentionally designed and carried out to deny Plaintiffs and their colleagues in SITRABI their fundamental rights to associate and organize, and did in fact result in the denial of these rights.

76. The acts described herein constitute violations of the law of nations, customary international law, and worldwide industry standards and practices, including, but not limited to, the specific laws, agreements, conventions, resolutions and treaties listed in paragraph 61, *supra*. The acts described herein are actionable under the ATCA, and, if such a showing is required, were done with the complicity of state actors. In acting together with its agent, the security force permitted to exist and openly operate under the laws of Guatemala, and assisted by the government officials of the Municipality Morales Izabal, Defendants acted under color of law in violating each of the applicable laws, agreements, conventions, resolutions and treaties listed in paragraph 61, *supra*. Further, the Government of Guatemala fails to enforce its laws that would prevent or remedy the violations alleged herein.

77. Defendants' conduct in violation of the law of nations, customary international law, and worldwide industry standards and practices, including, but not limited to, the specific laws, agreements, conventions, resolutions and treaties listed in paragraph 61, *supra*, has caused Plaintiffs significant injury. Defendants are jointly and severally liable for the acts of any subsidiaries that are in violation of the law of nations, customary international law, and worldwide industry standards and practices, including, but not limited to, the specific laws, agreements, conventions, resolutions and treaties listed in paragraph 61, *supra*. Defendants are also vicariously liable for any violations of their employees and/or agents of the law of nations, customary international law, and worldwide industry standards and practices, including, but not limited to, the specific laws, agreements, conventions, resolutions and treaties listed in paragraph 61, *supra*. Plaintiffs are entitled to injunctive relief and to recover compensatory and punitive damages in amounts to be ascertained at trial.

Fourth Cause of Action

RICO Violations

18 U.S.C. § 1961 et seq

78. Plaintiffs incorporate by reference paragraphs 1 through 77 of this Complaint as if set forth herein.

79. Defendant Del Monte, Inc. is a person within the meaning of 18 U.S.C. § 1961(3). Defendants Del Monte, Inc., Del Monte Fresh and/or Bandegua, and the security force collectively as an association, in fact

constitute an enterprise (hereafter referred to as the "Bandegua Enterprise") within the meaning of 18 U.S.C. § 1961(4). In violation of 18 U.S.C. § 1962(c), Defendant Del Monte, Inc. or Del Monte Fresh through its employees and agents has conducted, and continues to conduct, the affairs of the Bandegua Enterprise through a pattern of racketeering activity consisting of multiple acts and threats of murder, kidnapping and extortion, as set forth specifically in Paragraphs 28 through 58. The purpose of this conspiracy was to give Defendant Del Monte, Inc. and/or Del Monte Fresh a financial advantage through the nullification of contractual and statutory rights of its employees on the Bobos plantation. This would increase Del Monte's revenues and profits.

80. In violation of 18 U.S.C. § 1962(d), Defendant Del Monte, Inc., Del Monte Fresh and/or Bandegua has conspired, and continues to conspire, to violate 18 U.S.C. § 1962(c). As a result of this unlawful conspiracy, Plaintiffs were all subjected to being physically attacked, threatened constantly with death and serious bodily injury while being held captive at gunpoint, and other forms of brutality and cruelty. These acts were inflicted intentionally and with malice to cause Plaintiffs severe mental and physical pain and suffering, and to have the lasting effect of forever causing Plaintiffs to live in fear of being subjected to similar acts. They are entitled to compensatory and punitive damages, as well as statutory damages under RICO, including treble damages, as well as injunctive relief, in an amount to be determined at trial.

Fifth Cause of Action

Battery

81. Plaintiffs incorporate by reference paragraphs 1 through 80 of this Complaint as if set forth herein.

82. Defendants committed, or acted in concert to commit, or Defendants' employees or agents committed acts which resulted in harmful or offensive contact with the bodies of Plaintiffs. Plaintiffs did not consent to the contact, which caused injury, damage, loss and harm to each of the Plaintiffs.

83. The acts described herein constitute battery, actionable under the laws of Florida, the laws of the United States and the laws of Guatemala.

Sixth Cause of Action

Assault

84. Plaintiffs incorporate by reference paragraphs 1 through 83 of this Complaint as if set forth herein.

85. Defendants committed, or acted in concert to commit, or Defendants' employees or agents committed acts which caused Plaintiffs to be apprehensive that Defendants would subject them to imminent batteries and/or intentional invasions of their rights to be free from offensive and harmful contact, and said conduct demonstrated that Defendants had a present ability to subject Plaintiffs to an immediate, intentional, offensive and harmful touching. Plaintiffs did not consent to such conduct, which caused injury, damage, loss and harm to each of the Plaintiffs.

86. The acts described herein constitute assault,

actionable under the laws of the Florida, the laws of the United States and the laws of Guatemala.

Seventh Cause of Action

Arbitrary Arrest and Detention

87. Plaintiffs incorporate by reference paragraphs 1 through 86 of this Complaint as if set forth herein.

88. Defendants committed, or acted in concert to commit, or Defendants' employees or agents committed acts which caused Plaintiffs to be arrested and detained. Such arrest and detention of Plaintiffs was illegal and unjust, carried out without a warrant, probable cause, reasonable suspicion or notice of charges.

89. Plaintiffs were placed in fear for their lives, were deprived of their freedom, separated from their families and forced to suffer severe physical and mental abuse. Plaintiffs did not consent to such conduct, which caused injury, damage, loss and harm to each of them.

90. The acts described herein constitute arbitrary arrest and detention, actionable under the laws of Florida, the laws of the United States, and the laws of Guatemala.

Eighth Cause of Action

False Imprisonment

91. Plaintiffs incorporate by reference paragraphs 1 through 90 of this Complaint as if set forth herein.

92. Defendants committed, or acted in concert to commit, or Defendants' employees or agents committed acts to unlawfully exercise force or the express or implied threat of force to restrain, detain or confine Plaintiffs. The restraint, detention or confinement compelled Plaintiffs to stay or go somewhere against their will for some appreciable time.

93. Plaintiffs were placed in fear for their lives, were deprived of their freedom, separated from their families and forced to suffer severe physical and mental abuse. Plaintiffs did not consent to such conduct, which caused injury, damage, loss and harm to each of them.

94. The acts described herein constitute false imprisonment, actionable under the laws of Florida, the laws of the United States, and the laws of Guatemala.

Ninth Cause of Action

Intentional Infliction of Emotional Distress

95. Plaintiffs incorporate by reference paragraphs 1 through 94 of this Complaint as if set forth herein.

96. The acts described herein constitute outrageous conduct against Plaintiffs, and were without privilege.

97. Defendants committed, or acted in concert to commit, or Defendants' employees or agents committed acts which intended to cause Plaintiffs to suffer emotional distress. In the alternative, Defendants engaged in the conduct with reckless disregard of the probability of causing Plaintiffs to suffer emotional distress, Plaintiffs were present at the time the

outrageous conduct occurred, and Defendants knew that the Plaintiffs were present.

98. Plaintiffs suffered severe emotional distress, and the outrageous conduct of Defendants was a cause of the emotional distress suffered by Plaintiffs.

99. Defendants' outrageous conduct constitutes the intentional infliction of emotional distress and is actionable under the laws of Florida and the laws of the United States.

Tenth Cause of Action

Negligent Infliction of Emotional Distress

100. Plaintiffs incorporate by reference paragraphs 1 through 99 of this Complaint as if set forth herein.

101. At all relevant times, Defendants, and each of them, owed Plaintiffs a duty to act with reasonable care, and at all relevant times, harm and/or injury to the Plaintiffs was reasonably foreseeable if such duty of care was breached.

102. At all relevant times, Defendants, and each of them, had the power, ability, authority and duty to stop engaging in the conduct described herein and to intervene to prevent or prohibit such conduct.

103. At all relevant times, Defendants, and each of them, knew, or reasonably should have known, that the conduct described herein would and did proximately result in physical and emotional distress to Plaintiffs.

104. Despite said knowledge, power, and duty,

Defendants, and each of them, breached their duty to Plaintiffs, and thereby negligently failed to act so as to stop engaging in the conduct described herein and to prevent or to prohibit such conduct or to otherwise protect Plaintiffs. To the extent that said negligent conduct was perpetrated by employees or agents of Defendants, the Defendants confirmed and ratified said conduct with the knowledge that Plaintiffs' emotional and physical distress would thereby increase and with a wanton and reckless disregard for the deleterious consequences to Plaintiffs.

105. As a direct and legal result of Defendants' wrongful acts, Plaintiffs have suffered and will continue to suffer significant physical injury, pain and suffering and extreme and severe mental anguish and emotional distress.

106. Defendants' conduct constitutes the negligent infliction of emotional distress and is actionable under the laws of Florida, and the laws of the United States.

Eleventh Cause of Action

Negligence Per Se

107. Plaintiffs incorporate by reference paragraphs 1 through 106 of this Complaint as if set forth herein.
108. Defendants failed to use ordinary or reasonable care in order to avoid injury to the Plaintiffs. Defendants' negligence was a cause of injury, damage, loss and harm to Plaintiffs.

109. As a result of these acts, Plaintiffs suffered harm including, but not limited to, physical harm, pain and

suffering, and severe emotional distress. Defendants' conduct constitutes negligence and is actionable under the laws of Florida, the United States, Guatemala, the law of nations, customary international law, and worldwide industry standards and practices, including, but not limited to, the specific laws, agreements, conventions, resolutions and treaties listed in paragraph 61, *supra*.

Twelfth Cause of Action

Aiding and Abetting

110. Plaintiffs incorporate by reference paragraphs 1 through 109 of this Complaint as if set forth herein.

111. Defendants knowingly provided substantial assistance to its agents and/or employees, including the security force that committed the wrongful acts delineated in the preceding eleven causes of action at PP65 - 109 at the time such wrongful acts were perpetrated.

112. Defendants' aiding and abetting the wrongful acts delineated in the preceding eleven causes of action at PP65 - 109 is actionable under the laws of Florida.

IX. DEMAND FOR JURY TRIAL

104. Plaintiffs demand a trial by jury on all issues so triable.

X. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request the Court to:

(a) enter judgment in favor of Plaintiffs on all counts of the Complaint;

(b) declare that Defendants have violated Plaintiffs' human rights and the laws of the State of Florida and the United States, as set forth herein;

(c) award Plaintiffs compensatory and punitive damages, as well as statutory damages and treble damages under RICO;

(d) grant Plaintiffs equitable relief, permanently enjoining Defendants from further engaging in human rights abuses against Plaintiffs and their fellow members of SITRABI;

(e) award Plaintiffs the costs of suit including reasonable attorneys' fees, and

(f) award Plaintiffs such other and further relief as the Court deems just under the circumstances.

Respectfully submitted this day of January, 2003,

ATTORNEYS FOR PLAINTIFF: Terry Collingsworth, D.C. Bar No. 471830, Natacha Thys, D.C. Bar No. 458143, INTERNATIONAL LABOR RIGHTS FUND, Suite 920, 733 15th Street N.W., Washington, DC. 20005, (202) 347-4100, Fax (202) 347-4885.

LOCAL COUNSEL FOR PLAINTIFFS: Robert Sugarman, Florida Bar No. 149-388, SUGARMAN & SUSSKIND, 2801 Ponce de Leon Blvd., Suite 750, Coral Gables, FL 33134, (305) 529-2081, Fax (305) 447-8115.

Case Number: 01-3399-CIV-MORENO

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA,
MIAMI DIVISION

ANGEL ENRIQUE VILLEDA ALDANA, et al.,
Plaintiffs,

vs.

FRESH DEL MONTE PRODUCE, INC. d/b/a DEL MONTE FRESH PRODUCE COMPANY and COMPANIA DE DESARROLLO DE GUATEMALA, S.A. (BANDEGUA),
Defendants.

December 12, 2003, Decided
December 12, 2003, Filed

JUDGES: FEDERICO A. MORENO, UNITED STATES DISTRICT JUDGE.

OPINION BY: FEDERICO A. MORENO

OPINION:

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

The claims asserted by Plaintiffs in this action arise out of a series of events that took place in a Guatemalan village during an otherwise peaceful October day in 1999. Plaintiffs, all Guatemalan citizens, claim that Defendants Fresh Del Monte Produce, Inc., Del Monte

Fresh Produce Company, and Compania de Desarollo Bananero de Guatemala, S.A. were active participants in torture and other human rights violations designed to put an end to their leadership in trade union activities.

Plaintiffs seek to invoke federal court jurisdiction under the Alien Tort Claims Act, *28 U.S.C. § 1350* ("ATCA"), the Torture Victims Protection Act of 1991 ("TVPA"), *28 U.S.C. § 1350*, the Racketeer Influenced and Corrupt Organizations Act ("RICO"), *18 U.S.C. § 1961, et seq.*, and *28 U.S.C. § 1332* and *28 U.S.C. § 1367* for their non-Federal claims. Before the Court is Defendants' Joint Motion to Dismiss the Third Amended Complaint for Lack of Subject Matter Jurisdiction and Failure to State Claim Upon Which Relief Can Be Granted. For the reasons set forth below, the motion to dismiss is GRANTED.

I. BACKGROUND

On the evening of October 13 and into the morning of October 14, 1999 an armed group of Guatemalans kidnapped and detained Plaintiffs, who were officers of Sindicato de Trabajadores del Banano de Izabla ("SITRABI"), the labor union representing the workers at Del Monte's Bobos banana plantation in Guatemala. SITRABI was about to call a strike in response to alleged company violations of the collective bargaining agreement. Over the course of the rest of night and into the next morning, Plaintiffs claim that they were subject to a whole host of violations of international law perpetrated in part by Defendants' agents and employees, including kidnapping, torture, and unlawful detention.

The Plaintiffs, Angel Enrique Villeda Aldana ("Villeda"), Jorge Agustin Palma Romero ("Palma"), Oscar Leonel Guerra Evans, Lyicnhel McIntosh Rodriguez, Marel Martinez ("Martinez"), Gumerzindo Loyo Martinez, and Rigoberto Alvayero Hernandez (collectively, "Plaintiffs") are all citizens of Guatemala that are currently residing in California and Nevada. They brought suit for equitable relief and for damages to remedy the injury to their persons caused by the alleged wrongful conduct of Defendants Fresh Del Monte Produce, Inc. ("Del Monte, Inc."), Del Monte Fresh Produce Company ("Del Monte Fresh"), and Compania De Desarollo Bananero De Guatemala, S.A. ("Bandegua"). Plaintiffs allege that Del Monte, Inc. is a for-profit company that controls, manages or supervises all aspects of production, distribution and marketing of its fresh produce on a worldwide basis from its office in Coral Gables, Florida. Defendants Del Monte Fresh, a Delaware corporation, and Bandegua, a Guatemalan corporation, are alleged to be wholly-owned subsidiaries of Del Monte, Inc.

The Third Amended Complaint ("TAC") alleges that through its wholly-owned subsidiaries Del Monte, Inc. owns, leases and/or operates banana plantations in Guatemala. TAC P 22. Among the plantations it owns and operates in Guatemala is the Zaculeu Lanquin Arapahoe Plantation ("Bobos Plantation") in the Bobos District Municipality of Morales Izabal in Guatemala.

In September 1999, Bandegua was in negotiations with officers of SITRABI, the Guatemalan labor union for plantation workers. Plaintiffs allege that Del Monte, Inc. was involved in these negotiations. TAC P 26. Bandegua had announced that it was terminating operation of the Bobos plantation and laying off 918

workers, all SITRABI members. *Id.* Defendant Del Monte, Inc. and Bandegua were engaged in negotiations with SITRABI for a new collective bargaining agreement covering the workers at the Bobos plantation prior to the events on that fateful day. *Id.* Plaintiffs were among the terminated workers, and they allege that Defendants decided to cripple the Union.

Beginning on the afternoon of October 13, 1999, the Third Amended Complaint alleges a harrowing series of events. Plaintiffs allege that leaders of a security force met with employees and/or agents of the Del Monte defendants at a local restaurant to plan violent action against the Plaintiffs and other SITRABI leaders. *Id.* P 30. Believed to be present at this meeting was Bandegua's General Manager, Jorge Arturo Osborne Escalante, and two contractors for Del Monte, who had performed regular services for Defendants. *Id.* P 31. Plaintiffs allege that the result of this meeting was a plan and agreement to kidnap and terrorize the Plaintiffs in order to break the SITRABI union by eliminating the leadership and gaining a bargaining advantage in the ongoing labor dispute. *Id.* P 31.

In the early evening, the security force, now allegedly a large gang, came to the SITRABI headquarters in the Municipality of Morales, Izabal to carry out and implement the plan. Plaintiffs Palma and Evans were in the SITRABI office when the security force arrived. The Third Amended Complaint alleges that they were detained at gunpoint by the security force and threatened with death. Evans was taken to an adjoining room by the security force and kept there under heavy guard, while being confronted with threats of death and frequent jabbing with the weapons. Palma

was ordered into a car, and forced to show where another Plaintiff, Marel Martinez, resided. Once the security force reached Martinez's house, they abducted him at gunpoint. The two Plaintiffs were then driven back to the SITRABI office. Martinez then was forced to telephone Plaintiff Aldana, another SITRABI leader, and tell him to come to the office right away. Martinez was warned that if he failed to deliver the message properly, he would be killed. Martinez was also forced to call other SITRABI leaders and summon them to the office.

Through interdiction by this security force and threats, the other Plaintiffs were rounded up and taken along with the already detained Plaintiffs, Aldana, Martinez, Palma, Evans and taken to the auditorium of the Union office. By now, they had been repeatedly threatened with death as multiple weapons were pointed at their heads. They were accused of being responsible for the declining business in the area, and their captors began debating the next course of action. Plaintiffs allege that they sustained injuries as they were pushed and shoved around. *Id.* P 46.

At some point in the ensuing confusion, the current mayor, then a candidate, for the mayor of Morales, Manuel Sosa Castaneda arrived and with his intervention, a consensus was reached where the two main SITRABI leaders, Aldana and Martinez, would be taken to a radio station where they would be forced to denounce the union. Id. P 47. Accompanied by the mayor at the time, Israel Farcia, the two Plaintiffs were transported to the radio station and forced at gunpoint to make an on-air announcement that the labor dispute with Del Monte was over, the workers

should return to work, and that the leaders of SITRABI would resign their posts. *Id.* P 50

After the completion of the announcement, the two Plaintiffs were taken at gunpoint back to the SITRABI office. They allege that they were forced at gunpoint to sign form resignation and release letters that were faxed to the office. Del Monte's Chief of Security at the plantation, Carlos Enrique Hernandez Diaz, was present and allegedly speaking to persons in the management staff of Del Monte by walkie talkie. *Id.* P 51. Once the letters were signed, the Plaintiffs allege they were threatened with death if they did not leave the plantation area. Plaintiffs Aldana and Palma were pounded in the chest to drive the point home. *Id.* P 54.

At 2:00 A.M. on the morning of October 14, 1999, Plaintiffs were released from their detention and, after hastily gathering their families, they fled to Guatemala City. *Id.* P 55. They attempted to complain to the Ministry of Labor, but they had been pre-empted by the General Manager for Bandegua, who had claimed that all the Plaintiffs had signed voluntary letters of resignation.

Shortly after these events, in March 2001, after living in hiding, five of the Plaintiffs were relocated to the United States with the intervention of the U.S. embassy in Guatemala. n1 They were all recently granted asylum status. The Plaintiffs filed this action in Federal Court on August 2, 2001. In response to court order, the Plaintiffs filed their Third Amended Complaint ("TAC") on February 5, 2003. Defendants filed their motions to dismiss on May 13, 2002. n2 The Court denied Defendant's Motion to Dismiss for *Forum Non Conveniens* on June 3, 2003 and also provisionally

denied Bandegua's Motion to Dismiss for Lack of Personal Jurisdiction pending jurisdictional discovery which ended on July 30, 2003. Additionally, the Court solicited supplemental memoranda from the parties on the disputed issues of international law. Both Plaintiffs and Defendants have submitted declarations from experts on international law for the Court's inspection.

II. LEGAL STANDARD

A court will not grant a motion to dismiss unless the plaintiff fails to allege any facts that would entitle the plaintiff to relief. *Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957).* When ruling on a motion to dismiss, a court must view the complaint in the light most favorable to the plaintiff and accept the plaintiff's well-pleaded facts as true. *Scheuer v. Rhodes, 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974); St. Joseph's Hosp., Inc. v. Hosp. Corp. of Am., 795 F.2d 948, 953 (11th Cir. 1986).*

A defendant may move to dismiss a complaint if it fails to allege facts sufficient to invoke the court's subject matter jurisdiction. *Fed. R. Civ. P. 12(b)(1).* The party invoking jurisdiction bears the burden of producing the necessary facts to establish subject matter jurisdiction. *Taylor v. Appleton, 30 F.3d 1365, 1367 (11th Cir. 1994).*

III. ANALYSIS

A. THE ALIEN TORT CLAIMS ACT (COUNTS I & III)

Plaintiffs seek to redress human rights violations under the ATCA and the TVPA. As noted above, the Plaintiffs complain individually of (1) torture, [**11] (2) kidnapping, (3) unlawful detention, (4) crimes against

humanity, (5) denial of fundamental right to associate and organize. They rest responsibility for these acts upon a theory of joint action between Defendants and the local officials.

Under the Alien Tort Claims Act, *28 U.S.C. § 1350*, violations of the law of nations may confer federal jurisdiction. The ATCA provides that the "district court shall have original jurisdiction over any action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." *28 U.S.C. § 1350*. Federal subject matter jurisdiction exists when: (1) an alien sues (2) for a tort (3) committed in violation of the law of nations. *Kadic v. Karadzic, 70 F.3d 232, 238 (2d Cir. 1995)*.

The Eleventh Circuit has recognized that the ATCA "establishes a federal forum where courts may fashion domestic common law remedies to give effect to violations of customary international law." *Abebe-Jira v. Negewo, 72 F.3d 844, 848 (11th Cir. 1996), cert. denied, 519 U.S. 830, 136 L. Ed. 2d 51,* [*1292] *117 S. Ct. 96 (1996)*. n3 Thus, the ATCA "creates both [**12] subject matter jurisdiction and a private right of action." *Estate of Winston Cabello v. Fernandez-Larios, 157 F. Supp. 2d 1345 (S.D. Fla. 2001)* (citing *Abebe-Jira, 72 F.3d at 848*)). In this case, it is undisputed that the plaintiffs are aliens suing in tort so the Court turns to a discussion of the dispositive third element.

The ATCA requires that a more searching review of the merits to establish jurisdiction that is required under the more flexible "arising under" formula of *Section 1331. Amlon Metals, Inc. v. FMC Corp., 775 F. Supp. 668, 671 (S.D.N.Y. 1991); accord Kadic, 70 F.3d at 238.* n4 With respect to the third element, and to

survive a *12(b)(1)* motion to dismiss, the complaint must identify the specific international law that the defendant allegedly violated. *Kadic, 70 F.3d at 238.* This is a higher standard of pleading than traditionally required. *Id.* The heightened pleading standard requires that the complaint identify facts showing Defendants violated a specific international law. *Sinaltrainal v. Coca-Cola, Co., 256 F. Supp. 2d 1345, 1352 (S.D. Fla. 2003).*

Thus, jurisdictional concerns are not satisfied by merely alleging a colorable violation of the law of nations. *See id.* "This court must thoroughly examine the merits of the plaintiff's complaint to determine whether it has [ATCA] jurisdiction." *Jogi v. Piland, 131 F. Supp. 2d 1024, 1026 (C.D. Ill. 2001).* Moreover, the "paucity of suits successfully maintained under [the ATCA] is readily attributable to the statute's requirement of alleging a violation of the law of nations at the jurisdictional threshold." *Filartiga v. Pena-Irala, 630 F.2d 876, 887-888 (2d Cir. 1980).* Finally, although Plaintiffs' claims raise significant issues of international law, the task before the Court is not to resolve them; rather the Court must determine whether the complaint adequately pleads a violation of the law of nations.

1. Defining the Law of Nations

Under the ATCA, the "law of nations" refers to a body of law known as customary international law. *Flores v. Southern Peru Copper Corp., 343 F.3d 140, 154 (2d Cir. 2003).* Conduct violates the "law of the nations" if it contravenes "well-established, universally recognized norms of international law." *Kadic v.*

Karadzic, 70 F.3d 232, 239 (2d Cir. 1995), cert. denied, 518 U.S. 1005, 135 L. Ed. 2d 1048, 116 S. Ct. 2524 (1996).

Defining customary international law is no simple feat; it is "discerned from myriad decisions made in numerous and varied international and domestic arenas." *Flores, 343 F.3d at 154.* In *United States v. Smith, 18 U.S. (5 Wheat.) 153, 160-61, 5 L. Ed. 57 (1820)*, the Supreme Court counseled that the law of nations "may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognising and enforcing that law." Moreover, courts "must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today." *Kadic, 70 F.3d at 238* (quoting *Filartiga v. Pena-Irala, 630 F.2d 876, 881 (2d Cir. 1980))*.

Customary international law, in short, is composed "only of those rules that States universally abide by, or accede to, out of a sense of legal obligation and mutual concern." *Flores, 343 F.3d at 154.* The Second Circuit has succinctly set out three principles that flow from this proposition. *Flores, 343 F.3d at 140.* First, States must universally abide by the rule embodied in customary international law. *Id.* Second, States must accede to it out of a sense of legal obligation.*Id.* Third, customary international law addresses only those "wrong[s] that are 'of mutual, and not merely several, concern' to States." *Id.* (quoting *Filartiga, 630 F.2d at 888*). This aspect of customary international law is often overlooked. "Matters of several concern among States are matter in which States are separately and independently interested." *Id.* International accords can often signify a matter of multinational concern.

Therefore, even if certain conduct is universally proscribed by States in their respective domestic legal regimes that fact alone does not automatically create an actionable violation of international law under the ATCA.

The inquiry does not end there. Stringent and rigorous standards are applied by courts in ATCA cases. The tort pled must be "definable, obligatory (rather than hortatory) and universally condemned." *Forti v. Suarez-Mason, 672 F. Supp. 1531, 1539-41.* To satisfy this specificity requirement, the following is required: (1) no state condones the act in question, and there is a recognizable "universal" consensus of prohibition against it; (2) there are sufficient criteria to determine whether a given action amounts to the prohibited act and thus violates the norm; and (3) the prohibition against it is non-derogable and therefore binding at all times upon all actors. *Xuncax v. Gramajo, 886 F. Supp. 162, 184 (D. Mass. 1995).* Moreover, citing sources of international law that "merely refer to a general sense of ... responsibility and state abstract rights and liberties devoid of articulable or discernable standards and regulations to identify practices that constitute international ... abuses or torts" is insufficient to support a claim that a particular conduct is universally proscribed by the law of nations. *Beanal v. Freeport-McMoran, Inc., 197 F.3d 161, 167 (5th Cir. 1999); see also Flores v. S. Peru Copper Corp., 253 F. Supp. 2d 510, 524 (S.D.N.Y. 2002), aff'd, Flores v. S. Peru Copper Corp., 343 F.3d 140 (2d Cir. 2003).*

Defendants' argument proceeds on two fronts: first, they assert none of these claims rises to the level of international law because either the conduct does not implicate international norms or the international norm

itself is not actionable under the ATCA; and second, they assert that the element of state action, an essential component in pleading a violation of certain norms of international law, is missing from all these claims. *See Carmichael v. United Technologies Corp., 835 F.2d 109, 113 (5th Cir. 1988).* The Court will analyze each claim separately and then discuss the issue of state action with respect to all the claims at the conclusion of the discussion.

2. Torture

While deliberate torture under color of law is actionable under the ATCA and the TVPA, defendants contend that the allegations in the Third Amended Complaint, even assuming them to be true, do not constitute a violation of "universally accepted norms of international law." *See Filartiga, 630 F.2d at 878.* Defendants claim that read together, the allegations only demonstrate coercive conduct designed to intimidate union leaders into disavowing their union and labor cause. Indeed, Defendants argue that there are no allegations of temporary or permanent physical injury.

Defendants assert that the conduct pales in comparison to the forms of torture that have been held to be actionable under the ATCA. *See Abebe-Jira, 72 F.3d at 848* (affirming judgment under the ATCA for women imprisoned for three to ten months, during which imprisoned women were stripped and bound, whipped with wire, hung by a pole, severely beaten, and tortured to aggravate the resulting wounds); *Filartiga, 630 F.2d at 877* (finding kidnapping and torturing to death by government official constituted official torture in violation of the law of nations);

Eastman Kodak v. Kavlin, 978 F. Supp. 1078 (S.D. Fla. 1997) (Ryskamp, J.) (court "reluctantly" denied motion to dismiss torture claim based on 10-day detainment accompanied by physical injuries).

Plaintiffs disagree and contend that the specific acts as alleged do constitute a valid claim of torture. First, the Plaintiffs claim that they were subjected to extreme mental anguish resulting from the intimidation and acts of coercion, not to mention the ever-present credible death threats from the security force. Second, through the repeated jabbing of loaded guns, they were subjected to physical torture. Nevertheless, while the acts do reflect a streak of cruelty, and were most certainly frightening, the events that transpired were essentially an eight-hour aggravated assault and not the form of torture contemplated by norms of international law. *See* S. Exec. Rep. No. 101-30, at 14 (1990)("The term 'torture,' in the United States and international usage, is usually reserved for extreme, deliberate and unusually cruel practices, for example, sustained systematic beating, application of electric currents to sensitive parts of the body, and tying up or hanging in positions that cause extreme pain.").

Moreover, Plaintiffs' attempts to paint the alleged conduct as fitting within the statutory definition of torture under the TVPA likewise fail. The TVPA provides that "an individual who, under actual or apparent authority, or color of law, of any foreign nation subjects an individual to torture shall, in a civil action, be liable for damages to that individual." *28 U.S.C. § 1350*, note § 2(a)(1). The TVPA defines 'torture' as "any act, directed against an individual in the offender's custody or physical control by which severe pain or suffering ... whether physical or mental,

is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession ... intimidating or coercing that individual." *28 U.S.C.*, note § 3(b)(1). "Mental pain or suffering" refers to "prolonged mental harm cause by or resulting from the intentional infliction or threatened infliction of severe physical pain or suffering ... [or] by the threat of imminent death." *28 U.S.C. § 1350*, note § 3(b)(2). Here, there is simply no allegation that Plaintiffs have suffered any prolonged mental harm or physical injury as a result of their alleged intimidation. Moreover, there are no direct allegations that Plaintiffs actually suffered any serious physical *injury to their persons* - just that they were exposed to a harrowing set of conditions. Coupled with the fact that the entire ordeal lacks the concentrated severity that characterizes other acts of actionable torture, this conduct cannot come within the scope of the TVPA's prohibitions.

While the Plaintiffs protest the Defendants' arguments as callous indifference, this Court is not bound to accept the Plaintiffs' labels for the alleged misconduct. *See Edwards v. City of Goldsboro, 178 F.3d 231, 244 (4th Cir. 1999)* ("we are not required to accept as true the legal conclusions set forth in a plaintiff's complaint"). Moreover, cases construing the scope of the ATCA and TVPA demonstrate that ordinary torts - even those intentionally inflicted out of malice - are insufficient to permit federal jurisdiction. *See, e.g., Eastman Kodak Co, 978 F. Supp. at 1092 (S.D. Fla. 1997)* (noting that "merely because a particular provision of an international convention forbids a particular sort of conduct does not make that conduct a violation of the law of nations cognizable under the

ATCA."). The instant case involves a situation where there are not allegations of any repeated beatings, physical torture, inhumane or prolonged imprisonment, or any identifiable physical injury. The allegations of torture during the eight-hour ordeal, while inappropriate and regrettable, simply do not rise to the level of "shockingly egregious violations of universally recognized principles of international law." *Zapata v. Quinn, 707 F.2d 691 (2d Cir. 1983).* Therefore, the Court cannot allow the torture claims to proceed as the ATCA does not reserve jurisdiction for these claims. n5

3. Unlawful Detention

Plaintiffs assert that their detention, against their will, during the October 13th events constitutes a violation of the international prohibition against arbitrary detention. *See Alvarez-Machain, 331 F.3d 604, 620 (9th Cir. 2003), cert. granted, 540 U.S. 1045, 157 L. Ed. 2d 692, 124 S. Ct. 821, 2003 WL 22251320 (U.S. Dec. 1, 2003)* ("there exists a clear and universally recognized norm prohibiting arbitrary arrest and detention"). This norm has been recognized by other courts and in virtually all comprehensive international instruments. *See, e.g., Universal Declaration of Human Rights,* G.A. Res. 217A (III), Doc. A/810 at 71 (1948); *International Convention on Civil and Political Rights,* 999 U.N.T.S. 171, ratified by the United States on June 8, 1992, at Article 9(1). For example, in *Abebe-Jira v. Negewo, 72 F.3d 844 (11th Cir. 1996),* the Eleventh Circuit affirmed the district court's finding that a claim for prolonged arbitrary detention by women imprisoned for three to ten months by leaders of governing units was actionable under the ATCA.

Defendants first contest the scope of the international prohibition. They argue that the law of nations does not recognize a *generalized* international norm against arbitrary detention, *see* Carter Decl., PP 68-75, but concede that over time, a very narrow and specific conduct involving state-sponsored prolonged arbitrary detention has coalesced into international law. Specifically, "[a] state violates international law, if, as a matter of state policy, it practices, encourages, or condones ... prolonged arbitrary detention." *Restatement (Third) of the Foreign Relations Law of the United States* § 702 (1987). Defendants argue that, contrary to Plaintiff's assertions, the length of detention appears to be an important factor that courts consider when assessing whether a violation has occurred. *See Mehinovic v. Vuckovic, 198 F. Supp. 2d 1322, 1349* (finding actionable under the ATCA claims where plaintiffs were detained for periods ranging from several days to two years). Defendants further argue that Plaintiffs' allegations of the 8-hour detention do not rise to the level of international prohibitions. Plaintiffs contend, however, that the norm against arbitrary detention does not contain a temporal element, that is, the length of time spent in detention. They cite *Alvarez-Machain v. United States*, a recent decision in the Ninth Circuit, where the Court states that the norm against arbitrary detention does not include a temporal element. *331 F.3d 604, 621 (9th Cir. 2003)*.

The Court does not pass judgment today in the abstract as to whether international law requires a temporal element. Nevertheless, there is often some egregious quality to the action that must be present for the conduct to be a violation of international law

cognizable under the ATCA. *See Eastman Kodak, 978 F. Supp. at 1078.* Here, the disputed issue is whether the conduct as alleged rises to a violation of international law. Plaintiffs cite cases they deem to be analogous where time of detention was similar to the case at hand. *See, e.g., Paul v. Avril, 901 F. Supp. 330, 335 (S.D. Fla. 1994)* (less than 10 hours); *Xuncax v. Gramajo, 886 162, 174-75 (D. Mass. 1995)* (less than a day). Nevertheless, they are distinguishable, as they involved detentions that featured egregious instances of torture, involving electric shocks in *Avril*, and over 100 cigarette burns in *Xuncax*. Further, plaintiffs in other cases have generally been detained in physically harrowing conditions of imprisonment. *See Eastman Kodak, 978 F. Supp. at 1094.* Finally, the eight-hour detention of the Plaintiffs by a non-governmental security force at their own headquarters is distinguishable from the filthy conditions of incarceration that Judge Ryskamp found marginally sufficient in a case where the conduct in question also gave the court pause. *See id.*

What the Plaintiffs ask the Court to do is to find that an eight-hour kidnapping by a shadowy 'security force', accompanied by threats of death, is actionable under the ATCA. Yet, this Court's review of other ATCA cases confirms that the added quality of egregiousness is what confers subject matter jurisdiction under the ATCA. Despite Plaintiffs best efforts at characterizing the October 13th events, the essential facts as alleged do not rise to a level of conduct actionable under the ATCA. This case, in effect, represents the outer bounds of what character of conduct might constitute a violation of the international norm against arbitrary detention. Again, the Court

finds that the specific allegations do not adequately state a violation of international law that is actionable under the ATCA. n6 While Plaintiffs suffered humiliation and fear when they were detained, that alone does not bring it within the ambit of the ATCA.

4. Right to Organize and Associate

Plaintiffs assert that Defendants' participation in the October 13th events in Morales Izabal have deprived them of their "fundamental rights to associate and organize." TAC P 75. Defendants contend, however, that the rights to associate and organize are not well-established, universally recognized norms of international law. They center their arguments on the lack of consistent state practice and the absence of any specific, definable norm of conduct that would violate the fundamental right to associate and organize.

Defendants first argue that Plaintiffs ignore the lack of any consistent practice regarding the alleged right to organize and associate. They cite the opposition or at least creation of severe obstacles to any right to organize and associate by a wide variety of countries, including China, Brazil, Egypt, and Russia. *See* Carter Decl. PP 41-42. They claim that this lack of consistent state practice demonstrates the lack of universal consensus on the issue. Plaintiffs, however, correctly point out that a state's conviction that the practice is required by law, or *opinio juris*, is the critical second element in finding that the freedom of association has ripened into customary international law. They assert that no country has expressly disputed that the norm exists, citing as an example the aftermath the Tiananmen Square events in China, where in its response to an ILO complaint, the Chinese government

did not contest that it was obligated to support freedom of association - rather, it denied the specific acts as charged. *See* O'Leary Decl. P 19. Therefore, state violations of the right to organize and associate are not *per se* evidence of the lack of international norm on the subject. However, the Court notes that for purposes of the ATCA, Plaintiffs must rely on stronger evidence than assumptions based on the absence of a country's explicit protestations regarding the existence of a fundamental right to associate and organize.

Second, and more persuasively, Defendants argue that reliance on a variety of treaties and non-binding declarations is misplaced in this case, since these are merely abstract rights and liberties concerning the right to freely associate and organize. Plaintiffs maintain that the rights to associate and organize are reflected in the *International Covenant for Civil and Political Rights* ("ICCPR"), the *United Nations Universal Declaration of Human Rights*, and Conventions 87 and 89 adopted by the International Labour Organization ("ILO"). Article 22 of the ICCPR includes the following language: "Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interest." *International Convention on Civil and Political Rights*, opened for signature Dec. 19, 1966, *6 I.L.M. 360, 368.* Further, the ILO Conventions 87 and 98 n7 also refer to the freedom of association and to organize and the right to organize. O'Leary Decl. P 9. ILO Convention 87 provides that "workers and employers, without distinction whatsoever, shall have the right to establish, and subject only to the rules of the organization concerned, to join organizations of their own choosing without

previous authorization." *See* Article 2. ILO Convention 98 provides a right to collectively organize. Plaintiffs therefore counter that the profusion of these treaties and conventions demonstrates that the freedom to associate is universal and obligatory.

The Court notes that these treaties and conventions are only evidence of international law and do not provide a basis for development of a customary norm of international law that is actionable under the ATCA. *See* Carter Decl. P 45. Moreover, to mechanically find that they constitute binding international obligations is also premature. Plaintiffs heavily rely on the twin ILO Conventions in attempting to demonstrate that the core right, to establish and join an organization of one's choosing, is universally recognized. Close inspection of their provisions, however, does not provide solid support for Plaintiffs' claimed universal rights. Both ILO Conventions contain clear limiting language that state "this Convention shall be binding only upon those Members of the International Labour Organization whose ratifications have been registered with the [ILO]." ILO No. 87, Art. 15; ILO No. 98, Art. 8. Additionally, acceptance of those documents is hardly unanimous, as roughly less than one-third of the ILO signatory countries have ratified the conventions. *See* Carter Decl. P 45. Therefore, these Declarations hardly provide a firm basis for declaring a universal obligation of customary international law for the right to associate and organize.

Third, and most importantly, the critical inquiry for the purposes of the ATCA is whether a specific, definable prohibition can be pinpointed. Plaintiffs have not provided any indication of what specifically identifiable conduct constitutes a violation of this

alleged norm. The language of the specific rights to associate in ICCPR for example contains little direction as to the specific conduct that would be in violation of its terms. Identifying a specific and definable norm is the meat and potatoes of an alleged ATCA violation, and without any legal guidance, the absence of specificity demonstrates further that the alleged norm has no legally discernable shape. *See Eastman Kodak, 978 F. Supp. at 1092* ("Merely because a particular provision of an international convention forbids a particular sort of conduct does not make that conduct a violation of international law).

This Court is not duty-bound to accept Plaintiffs' formulations of international law. For example, courts have routinely dismissed claims of corporate involvement in environmental pollution in other ATCA cases. *See, e.g., Flores, 343 F.3d 140* (affirming dismissal of personal injury action under the ATCA that alleged environmental pollution as violations of the "international right to life, "right to health," and "right to sustainable development"); *Beanal, 197 F.3d at 168* (finding that cultural genocide was not actionable as a discrete violation of international law). The decisions underscore that courts must dismiss claims based on aspirational normative concepts, rather than specific and definable conduct. In *Flores*, the Second Circuit held that the rights to life and health contained in various international instruments were insufficiently definite to constitute rules of customary international law. *Flores, 343 F.3d at 161.* Similarly, in *Beanal*, the Court rejected plaintiff's attempt to recover under the ATCA for damage to the environment and a specific habitat resulting from defendants' mining activity that allegedly violated international law based on the

"general sense of environmental responsibility, "the right to enjoy culture," and "the right to cultural development." *Beanal, 197 F.3d at 163, 166-69* ("it would be imprudent for a United States tribunal to declare an amorphous cause of action under international law that has failed to garner universal acceptance").

Moreover, abridgement of rights similar to the right to associate and organize, like the freedom of speech, has been found not to constitute a violation of the "law of nations." *See, e.g., Guinto v. Marcos, 654 F. Supp. 276, 280 (S.D. Cal. 1986)* (granting motion to dismiss for lack of subject matter jurisdiction under ATCA because, among other reasons, violation of *First Amendment* Right of Free Speech does not rise to level of universally recognized right); *DeWit v. KLM Royal Dutch Airlines, N.V., 570 F. Supp. 613, 618 (S.D.N.Y. 1983)* (no subject matter jurisdiction under ATCA for constitutional violations under the *First, Ninth,* and *Fourteenth Amendments of the U.S. Constitution*).

When pressed to define the norm, Plaintiffs argue that only some violations of the freedom to associate would be actionable under the ATCA, and then simply offer the conclusion the facts here do rise to that level. Second, they claim that the fact that countries cannot be bound by an un-ratified treaty is of no moment in this analysis, since Plaintiffs' citation to the profusion of treaties is meant to demonstrate a universal commitment to prevent the violation of the particular norm. Yet, Plaintiffs still do not explain how to actually achieve the 'rights to associate and organize' — and most importantly, "what conduct falls within or outside the law." *Flores, 343 F.3d at 161.* Further, they improperly rely on conclusory inferences of *opinion*

juris based on a country's lack of affirmatively objecting to a norm of customary international law as evidence of this supposed universal obligation. Still, this Court cannot dismiss the deduction that even if the October 13th events were calculated to prevent the Plaintiffs from engaging in their right to organize and collectively bargain, well-established, universal norms of customary international law might not specifically prohibit it.

Finally, while the Court notes that a recent opinion in a neighboring district court has recognized that the right to associate is actionable under the ATCA, it must depart from its reasoning on this issue. *Estate of Locarno v. Drummond, 256 F. Supp. 2d 1250 (N.D. Ala. 2003)* (relying on ILO Conventions 87 and 88 and ICCPR Article 22 in "reluctantly" finding that right to associate and organize are actionable torts under the ATCA). The court voiced caution in finding that the right to associate was actionable *at a preliminary stage of the proceedings. Id.* (emphasis added). Further, the decisions did not grapple with the essential amorphous nature of this right and attempt to define what conduct falls afoul of these claimed rights. Therefore, this Court declines to adopt the *Drummond* court's reasoning.

The characteristics of customary international law are often open to "creative interpretation," and this Court must progress with extraordinary care and restraint. *See Flores, 343 F.3d at 154.* Therefore, although this decision is not straightforward, for the foregoing reasons, this Court cannot let this claim proceed as Plaintiffs have not established the existence of customary international law "right to associate and organize." While Plaintiffs claim not to advocate that U.S. courts should be the forum for all labor disputes

worldwide, it is hard to imagine what claims of violations of the fundamental right to associate and organize would *not* be heard under the ATCA if this Court allowed the claims to proceed.

5. Crimes Against Humanity

Crimes against humanity have been recognized as violation of customary international law since the Nuremberg Trials in 1944. *See, e.g., Estate of Cabello v. Larios, 157 F. Supp. 2d 1345, 1360* (finding that "the ruling of the Nuremberg Tribunal memorialized the recognition of crimes against humanity as customary international law"). The Charter of the International Military Tribunal at Nuremberg, among other things, defined crimes against humanity, as "murder, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds in execution of, or in connection with, any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated." *Charter of the International Military Tribunal,* Aug. 8, 1945, art. 6(c), 82 U.N.T.S. 284. Generally, a crime of humanity must be perpetrated as part of a widespread or systematic attack against a civilian population. *See Rome Statute of the International Criminal Court,* July 17, 1998, art. 7, U.N. Doc. A/CONF. 183/9. *See also, Wiwa v. Royal Dutch Petroleum Co., 2002 U.S. Dist. LEXIS 3293, 2002 WL 319887, at *10 (S.D.N.Y. Feb. 28, 2002).*

Although the parties dispute whether a link between the alleged crimes and armed conflict is necessary, the violations alleged by Plaintiffs clearly do not constitute a "crime against humanity." As a

preliminary matter, Plaintiffs acknowledge that the definition of crimes against humanity is "not entirely settled." Pl. Suppl. Br. at 19. They attempt in vain to link the October 13th events to a long pattern Guatemalan internal strife regarding labor unionists, specifically since the coup of Guatemalan President Jacobo Arbenz in 1954. They cite to a number of UN documents and U.S. State Department Reports on Guatemala in attempting to show a pattern of state-sanctioned attacks on a discrete class of persons - the labor unionists. Pl. Suppl. Br. at 20-23.

Defendants strongly dispute that the alleged conduct even approaches a "crime against humanity" since this is reserved for the most egregious violations of international law, such as genocide and slavery. Most ATCA cases have determined liability for "crimes against humanity" only for the most heinous of crimes, such as murder and extermination, slavery, ethnic cleansing, and torture, which are undertaken as part of a widespread or systematic attack against a civilian population. *See, e.g. Sarei v. Rio Tinto, 221 F. Supp. 2d 1116, 1126-51 (C.D. Cal. 2002)* (finding that allegations of Papua New Guinea's government-imposed blockade which prevented medicine, clothing, and other essential supplies from reaching the people of the island of Bougainville and which resulted in more than 10,000 deaths over seven years, stated a claim for crimes against humanity under the ATCA); *Mehinovic, 198 F. Supp. 2d at 1322* (finding judgment for crimes against humanity against former Bosnian Serb Police officer based on various acts of brutality against Muslim plaintiffs during the Bosnian ethnic cleansing campaign); *Wiwa, 2002 U.S. Dist. LEXIS 3293, [WL] at *10* (finding that allegations of deportation or forced

exile and torture against the Ogoni people in Nigeria, as part of a widespread attack, stated a claim for crimes against humanity under the ATCA).

Moreover, there is simply no "widespread or systematic attack" against a civilian population in this case. Widespread is defined as a "frequent, large-scale action carried out collectively with considerable seriousness and directed against a multiplicity of victims." Carter Decl. P 63 (quoting *Prosecutor v. Akayesu*, ICTR, case No. ICTR-96-4-T, Judgment of Sept. 2, 1998, at P 580). Systematic is defined as "thoroughly organized action, following a regular pattern of the basis of a common policy and involving substantial public or private resources ... There must be some preconceived policy or plan." *Id.* Despite Plaintiffs' citation to a litany of reports by NGOS and international organizations, the October 13th events are simply too far attenuated from this backdrop. Second, the pattern of violence was directed at large swathes of the Guatemalan people - including scholars, students, human rights workers and judges. Pl. Suppl. Br. at 22-23. There is no isolated campaign against trade unionists. At best, the October 13th events represent an injustice to the labor unionists - however, to link it to a widespread, systematic plan or policy is simply too attenuated to be actionable under the ATCA and therefore this claim must fail.

B. PRESENCE OF STATE ACTION

Sufficiently alleging that defendant's conduct is under the color of official authority is a crucial component of a claim under the ATCA and TVPA. While international law does not require state action for certain violations such as genocide and piracy,

Plaintiffs have conceded that there must be state action for the claims asserted in their Third Amended Complaint. *See In re Estate of Ferdinand E. Marcos Human Rights Litigation, 978 F.2d 493, 501-02 (9th Cir. 1992)*. Mere conclusory allegations regarding state action cannot satisfy a plaintiff's burden under the ATCA. *See Beanal v. Freeport-McMoran, Inc., 197 F.3d 161, 165-169 (5th Cir. 1999)* (affirming dismissal of complaint asserting claims under the ATCA and TVPA for lack of specificity).

Typically, in ATCA actions against non-state actors such as Defendant corporations, courts look to the "color of law" jurisprudence of *42 U.S.C. § 1983* as a relevant guide to whether a private defendant is engaged in official action for the purposes of ATCA. *See Bigio v. Coca-Cola Co., 239 F.3d 440, 448*; *Kadic, 70 F.3d at 243*. "A private individual acts under color of law within the meaning of *Section 1983* when he acts together with state officials or with significant state aid." *Kadic, 70 F.3d at 245*. According to the Third Amended Complaint, Defendants hired or otherwise created an agency relationship with an armed and organized security force to use violence and intimidate the SITRABI leadership in order to affect the outcome of the ongoing collective bargaining negotiations and associated labor disputes concerning the workforce at the Bobos Plantation. TAC P 28.

This case presents a somewhat unusual issue of state action in the ATCA context. In most cases filed against corporations, the corporation is accused of complicity in what are clearly actions taken by state entities. *See Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289 (S.D.N.Y. 2003)*. Here, the issue is somewhat confusing, as both

the official conduct component to properly ascribe state action and the actual participation of the corporate Defendants is unclear. The October 13th events were carried out by unruly gang, but whether their conduct can be properly imputed to either the State or the Defendants is an issue that is clarified below. Accordingly, the Court first turns to whether there is official conduct that creates state action in the first place. Second, the Court considers whether the corporate Defendants can be found liable under the joint action variant of the "color of law" jurisprudence.

a. Official Conduct

Before private conduct can be found to constitute state action, however, it is necessary to determine whether direct involvement of the Guatemalan government or its employees and agents exists in the first place with regard to the October 13th events. To properly allege state action, the events of October 13th must be attributable to the state, or in other words, it must be official conduct. *See Beanal, 969 F. Supp. 362 (E.D. La. 1997), aff'd, 197 F.3d 161 (5th Cir. 1999)* (citing *Restatement of Foreign Relations, § 207 comment c*). A state is responsible for any violation of its obligations under international law resulting from action or inaction by "any organ, official, employee, or other agent of a government or of any political subdivision, acting within the scope of authority or under color of such authority." *Id.*

Defendants contend that Plaintiffs' allegations of state action are insufficient to sustain liability because the actions cannot be properly ascribed to state actors. Plaintiffs allege that civic and business leaders conspired with selected Del Monte officials to hatch a

plan to destroy the Union on October 13th and 14th. The TAC alleges a three-step series of events in which state action is claimed. Plaintiffs claim that the Defendants were private actors who aided and abetted state actors in perpetrating the October 13th events. First, Del Monte entities gathered together civic and business leaders and warned that closure of the Bobos plantation was inevitable if the labor strikes were not stopped. *See* TAC PP 28, 30-33, 40-44. Next, the business leaders plus a few Del Monte employees entered into a specific agreement of how to deal with the union leaders. Finally, the alleged conspiracy was then implemented, as the SITRABI leaders were rounded up. They allege that municipal leaders such as the Mayor and future Mayor of Morales, the President of the Morales Chamber of Commerce and several prominent businessmen were present at some point during the day's events. As the events transpired, the future Mayor of Morales at some point told the unruly mob to stand down. TAC PP 44, 47. Moreover, public officials intentionally failed to take action in order to permit the violence to occur. *Id.* Guatemalan law apparently sanctions the creation and use of private, armed security forces. *Id.*

Without more factual context, however, such as more detail regarding the state actor's participatory acts, whether they were acting within the scope of their authority or how they assisted Defendants, state action itself cannot be discerned in this case. *See Beanal, 969 F. Supp. at 379* ("The Complaint merely alleges an Indonesia military presence and obliquely refers to the participation of 'third parties' who aided [defendant] in the challenged conduct. The court finds that these allegations fail to make out a claim for state action ...").

Moreover, beyond their conclusory allegations of complicity, beyond a few sparse references to the presence of undefined "public officials" at certain meetings and events, there is no other detail that is generally required to find state action. *See Dwares v. New York, 985 F.2d 94 (2d Cir. 1993)* (internal citation omitted) (allegations of conspiracy under § *1983* require "details of time and place and the alleged effect of the conspiracy").

Close inspection of the allegations also reveals that Plaintiffs rely on conclusory allegations of causality in order to buttress their claim. Even when all favorable inferences are given, it would not necessarily implicate state action solely because of the presence of a few officials. Plaintiffs have alleged nowhere in the Third Amended Complaint that the alleged torture was perpetrated or actively condoned by the Guatemalan government or its agents or representatives. *See Drummond, 256 F. Supp. 2d 1250, 1261* (finding sufficient state action alleged where paramilitaries that murdered union leaders were dressed in Colombian military uniforms and were members of the military). Moreover, the perpetrators of the alleged torture -- the so-called "security force" - are not alleged to be state instrumentalities themselves. They are not even identified besides being a mob of local citizens, and further, the alleged state actors are only described as 'public officials' or 'civic leaders.' *See* TAC P 29. In most ATCA cases, the military, police, or paramilitaries actually commit the violence, whereas here, it is at best a group of Izabal citizens and local business leaders with a few references to undefined civic leaders sprinkled in for good measure.

Second, the fact that Guatemala has laws permitting private security forces does not by itself create state action whenever the security force acts. Plaintiffs claim that this law was a precondition for the Bobos events. If legislation allowing private security companies to engage in business constitutes "state action" then every claim against a security company would create § *1983* liability. *See, e.g.* Carter Decl. P82 (citing Article 8 of International Law Commission's Draft Articles on State Responsibility (2001)) (state action can be found for conduct when actors are "in *fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct*) (emphasis added). Moreover, this is not the case where paramilitary groups roam rampantly through the countryside. *See Sinaltrainal v. Coca-Cola Corp., 256 F. Supp. 2d 1345, 1357 (S.D. Fla. 2003)* (finding that state action existed where paramilitaries were alleged to function openly in Colombia and had continuing support from military and local police).

Third, a failure to enforce a law is not a basis for state action. It is well-established that "mere acquiescence of a state official in the actions of a private party is not sufficient to establish state action." *Gallagher v. Neil Young Freedom Concert, 49 F.3d 1442, 1453 (10th Cir. 1995); accord Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 164, 56 L. Ed. 2d 185, 98 S. Ct. 1729 (1978)* (holding certain activities were not properly attributable to the State for purposes of establishing "state action" under the *Fourteenth Amendment* because a State's mere acquiescence in a private action does not create state action); *McKeesport Hosp. v. Accreditation Council for Graduate Medical Education, 24 F.3d 519, 524 (3d Cir. 1994)* (holding

presence of government agent as observer was insufficient state action to support hospital's *§ 1983* due process claim). Furthermore, "a State's failure to protect an individual against private violence simply does not constitute a violation of the *Due Process Clause*," even when state actors "stood by and did nothing when suspicious circumstances dictated a more active role for them." *DeShaney v. Winnebago, 489 U.S. 189, 197, 203, 103 L. Ed. 2d 249, 109 S. Ct. 998 (1989).* The simple fact of the presence of the Mayor of Izabal at certain times during the October 13th incident is insufficient to find the necessary degree of participation or nexus without more allegations about the nature of his assistance or whether he was acting in his official capacity. Further, there is no indication that the Mayor of Izabal planned or authorized the events.

Plaintiffs counter that under well-worn *§ 1983* jurisprudence, state action can be found if they prove that the National Police intentionally refused to intervene as the October 13th gang allegedly tortured the Plaintiffs or failed to take enforcement action thereby allowing the wrongful acts to have their desired impact. *See, e.g., Griffin v. City of Opa-Locka, 261 F.3d 1295, 1311 (11th Cir. 2001); Depew v. St. Marys, 787 F.2d 1496, 1499 (11th Cir. 1986).* This rationale is flawed. The cases they cite are not analogous since they involve the requisite proof of custom necessary for municipal liability and not joint action. Moreover, there is no allegation that Defendants themselves directed the National Police not to intervene nor is there alleged links between the Defendants and any state actor who gave the non-interference command. Nor is there any indication of what the actors may have done, whether they were

acting within the scope of their authority, and how they may have assisted Defendants. The chain of causation that Plaintiffs posit - the alleged general threat by Defendants that "something had to be done about SITRABI" at being a precipitating event for the ensuing events of October 13th is also insufficient to find state liability for acts mostly done by third parties, such as local business leaders. *See United States v. Iran*, 1980 I.C.J. 3, 29-30 (May 24, 1980) (Ayatollah Khomeini's general public declaration inveighing against the United States and congratulatory phone call to student militants after embassy seizure not sufficient to link the students' seizure of the U.S. embassy with "any competent organ of the Iranian state."). Therefore, the Court finds that there is no predicate state action for potential "joint action" between the government and the security force or Defendants.

b. Joint Action under Color of Law

Even assuming, *arguendo*, that Plaintiffs sufficiently alleged state action, they must still show that Defendants participated in the alleged violations of international law by acting together with the state officials to sustain their claims. Again, Plaintiffs have provided a murky group of facts that are wholly insufficient as a matter of law to hold Defendants responsible under prevailing legal standards.

The Supreme Court has articulated four tests to determine whether private conduct constitutes state action: (1) the "nexus test"; (2) the "symbiotic relationship test"; (3) the "joint action test"; and (4) the "public function test." *See Brentwood Academy v. Tennessee Secondary School Athletic Assoc., 531 U.S. 288, 296, 148 L. Ed. 2d 807, 121 S. Ct. 924 (2000).*

Plaintiffs allege that participation of state civil officials in the wrongful acts along with the cooperation of state officials satisfies any requirement of state action. *See* TAC P 66 ("the acts described herein are actionable under the ATCA, and if such a showing is required, were done with the complicity of state actors. In acting together with its agent, the security force [was] permitted to exist and openly operated under the laws of Guatemala, and assisted by government officials of the Bobos District").

Plaintiffs claim that Defendants can be held liable as de facto state actors under the "joint action test." n8 Joint action exists where private persons are "jointly engaged with state officials in the challenged action." *Dennis v. Sparks, 449 U.S. 24, 27-28, 66 L. Ed. 2d 185, 101 S. Ct. 183 (1980) (citing Adickes v. S.H. Kress & Co., 398 U.S. 144, 152, 26 L. Ed. 2d 142, 90 S. Ct. 1598 (1970).* Traditionally, either a conspiracy or "willful participation" with the state actor will satisfy the "joint action" test. *National Coalition Gov't of the Union of Burma v. Unocal, 176 F.R.D. 329, 346 (C.D. Cal. 1997) (citing Collins v. Womancare, 878 F.2d 1145, 1150 (9th Cir. 1989).* Moreover, the *Wiwa* court recently clarified that allegations of a "substantial degree of cooperative action between the state and private actors" also establishes joint action. *Wiwa, 2002 U.S. Dist. LEXIS 3293, [WL] at *13.*

Plaintiffs' bare allegations of state action make it unclear whether Defendants can be held liable under *any* "color of law" analysis. Plaintiffs position two management employees of Bandegua at the meeting where the conspiracy to put down the SITRABI union was allegedly hatched and then argue that their involvement throughout the day's events is sufficient to

find the joint action necessary. Plaintiffs also contend that Del Monte entities gathered together civic and business leaders and warned that closure of the Bobos plantation was inevitable if the labor strikes were not stopped. *See* TAC PP 28, 30-33, 40-44. Yet, this is insufficient to establish causality, and there are scarcely any other legally acceptable allegations of joint action. As noted above, the TAC fails to state any facts beyond the mere presence of undefined public officials at the conspiracy meetings and the appearance of the Mayor of Izabal during the evening.

Plaintiffs, however, contend that other courts have found such allegations of conspiracy are sufficient to find joint action. *See, e.g., United Steelworkers of Am. v. Phelps Dodge Corp., 865 F.2d 1539, 1545 (9th Cir. 1988)* (en banc), *cert. denied, 493 U.S. 809, 107 L. Ed. 2d 20, 110 S. Ct. 51 (1989)*(finding joint action established by common mission between private employer and local law enforcement officers to violate striker's rights); *Eastman Kodak, 978 F. Supp. at 1091* (conspiracy with Bolivian state judicial actors to keep Plaintiff in detention to extract a settlement). However, the cases are distinguishable. The allegations in *Eastman Kodak* involved more than a "personal vendetta by purely private persons." *Id. at 1092.* The contours of a clear conspiracy between a private individual and a judicial officer were outlined, with the end result of the local judge ordering plaintiff to be detailed in "miserable and life-threatening conditions until a settlement could be extorted." *Id.* In other words, the complaint contained allegations that, if proven, would be considered a conspiracy for the purposes of state action. Moreover, other ATCA cases where *de facto* liability was found were characterized by formalized relations between

state entities and private corporations. *See, e.g., Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 329 (S.D.N.Y. 2003)* (commercial relations between corporation and Government, and knowledge that payments for protection included unlawful acts); *Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424 (D.N.J. 1999)* (utilization of forced labor in accordance with Nazi directives to produce war material and increase production); *Doe v. Unocal, 963 F. Supp. 880 (C.D. Cal. 1997)* (formal agreement between corporation and government with respect to gas pipeline project).

Finally, Plaintiffs attempt to defer a determination of whether state action exists to the summary judgment stage, arguing that it is a fact-laden inquiry. *See Drummond, 256 F. Supp. 2d 1250, 1262 n. 6.* Under most circumstances, that would be the case. However, a Plaintiff cannot simply rely on conclusory allegations of joint action that that are inadequate to create sufficient state action. *See Bao Ge v. Li Peng, 201 F. Supp. 2d 14 (D.D.C. 2000)* (granting motion to dismiss ACTA claims against private corporation based on insufficient allegations of joint action under color of law).

C. TORTURE VICTIMS PROTECTION ACT (COUNT II)

Although the TVPA creates a private cause of action for torture perpetrated by individuals acting under the color of law of any foreign nation, it does not confer jurisdiction standing alone. n9 Claims for torture may be entertained only if they fall within the jurisdiction conferred by the ATCA *Abebe-Jira v. Negewo, 72 F.3d 844, 848 (11th Cir. 1996); Kadic, 70 F.3d at 246.* As the Court has found that Defendants

have not properly pled a violation of the international prohibition against torture, this claim must also be dismissed as it is now bereft of its substantive component. *See Sinaltrainal v. Coca-Cola Corp., 256 F. Supp. 2d 1345, 1357 (S.D. Fla. 2003).*

D. RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT (COUNT IV)

Plaintiffs allege that the Del Monte Defendants engaged in a conspiracy to cause physical and mental harm to Plaintiffs in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), *18 U.S.C. § 1961 et seq.* Compl. P 2. "To establish a violation of the substantive RICO provision, *18 U.S.C. § 1962(c)*, the Eleventh Circuit has held it necessary to prove the following: (1) the existence of an enterprise; (2) that the enterprise affected interstate commerce; (3) that the defendants were employed by or associated with the enterprise; (4) that the defendants participated, either directly or indirectly, in the conduct of the affairs of the enterprise; and (5) that the defendants participated through a pattern of racketeering activity." *BankAtlantic v. Coast to Coast Contrs., Inc., 22 F. Supp. 2d 1354, 1358 (S.D. Fla. 1998).* The Court finds that Plaintiffs have not properly pled these elements.

Defendants assert that because the Third Amended Complaint is based almost entirely on events that occurred in Guatemala, this Court has no subject matter jurisdiction to consider the RICO claim. In determining whether RICO applies to extraterritorial acts, the allegations must meet either the "conduct" test or the "effect" test. *Sinaltrainal, 256 F. Supp. 2d at 1359* (quoting *North South Fin. Corp. v. Al-Turki, 100*

F.3d 1046 (2d Cir. 1996). Under the "conduct" test, a court may assert subject matter jurisdiction over a RICO claim only if conduct material to the alleged crime or directly causing the alleged loss occurred in the United States. *See id.* Mere preparatory activities and conduct far removed from the completion of the wrongdoing are insufficient to confer subject matter jurisdiction.

Under the "effects" test, subject matter jurisdiction requires "substantial" effects which are a "direct and foreseeable result of the conduct outside the United States." *See Sinaltrainal, 256 F. Supp. 2d at 1359* (quoting *Consolidated Gold Fields PLC v. Minorco, S.A., 871 F.2d 252, 261-262*). The test is met when the domestic effect is a "direct and foreseeable result of the conduct outside of the United States." *Id. at 1359* (quoting *Consolidated Gold Fields, 871 F.2d at 261-262*).

In a recent decision of this Court, the Honorable Jose A. Martinez held that allegations of RICO violations based upon attacks on labor union leaders in Colombia failed to allege conduct satisfying either the conduct or effects test necessary to establish jurisdiction within the United States. *See Sinaltrainal v. Coca-Cola Co., 256 F. Supp. 2d 1345, 1359 (S.D. Fla. 2003)*. The facts in this case, while different in scope and severity, are nevertheless analogous in the RICO-context, as the allegations here essentially concern preparatory activities for foreign conduct that do not have a substantial effect within the United States. *See id.* Moreover, even if the scheme was hatched in the United States, as Plaintiffs allege, the connection to Defendants' profits is tenuous at best. Accordingly, RICO subject matter jurisdiction does not exist in this

case as a matter of law. Therefore, this claim is DISMISSED with prejudice.

E. PLAINTIFFS' STATE LAW CLAIMS (COUNTS V-XII)

1. Diversity Jurisdiction (*28 U.S.C § 1332*)

Plaintiffs' also allege a litany of state common law claims. Defendants contest the existence of diversity jurisdiction that would allow the Court to properly hear these claims. As an initial matter, for subject matter jurisdiction to be successfully premised on *28 U.S.C. § 1332*, diversity of citizenship must be complete. *See Cabalceta v. Standard Fruit Co., 883 F.2d 1553, 1557 (11th Cir. 1989)* (citing *Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 2 L. Ed. 435 (1806))*. "Diversity of citizenship 'should be distinctly and positively averred in the pleadings, or should appear with equal distinctness in other parts of the record.'" *Buti v. Impressa Perosa, S.R.L., 935 F. Supp. 458, 461 (S.D.N.Y. 1996), aff'd, 139 F.3d 98 (2d Cir. 1998), cert. denied, 525 U.S. 826, 142 L. Ed. 2d 57, 119 S. Ct. 73 (1998)* (citation omitted). The burden of proving that complete diversity exists rests upon the party seeking to invoke the Court's jurisdiction. *Leonard v. Kern, 651 F. Supp. 263, 264 (S.D. Fla. 1986).*

Defendants claim that Plaintiffs have failed to allege, and cannot demonstrate, that there is complete diversity of citizenship to permit subject matter jurisdiction under *28 U.S.C. § 1332*. The Court agrees. Plaintiffs admit that they are citizens of Guatemala who now reside in the United States. *See* TAC § § 6-12. Six of the Plaintiffs --Villeda, Guerra, McIntosh, Marel Martinez, G. Martinez and Hernandez -- reside in California. Additionally, Plaintiff Palma resides in

Nevada. Defendant Fresh Del Monte Produce is a Cayman Islands corporation, and Bandegua is a Guatemalan corporation. Thus, because the Plaintiffs are aliens suing two alien corporations, complete diversity does not exist. *See Corporation Venezolana de Fomento v. Vintero Sales Corp., 629 F.2d 786, 790 (2d Cir. 1980).*

Plaintiffs argue, however, that *§ 1332* diversity jurisdiction is not defeated because they are 'deemed' citizens of California and Nevada. All the Plaintiffs were granted asylum through the assistance of the U.S. Embassy and now are awaiting a final decision on permanent residency. The "deeming provision" of *28 U.S.C. § 1332(a)* provides that "for purposes of this section ... an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled."

This reliance is misplaced. First, the Eleventh Circuit has limited the deeming provision to only apply to aliens residing in the U.S. on a "permanent visa." *Foy v. Schantz, Schatzman & Aaronson, P.A., 108 F.3d 1347, 1349 (11th Cir. 1997).* Moreover, it is clear that persons admitted on non-immigrant or temporary work visas are not deemed citizens under *§ 1332. See, e.g., Miller v. Thermarite Pty. Ltd., 793 F. Supp. 306, 308 (S.D. Fla. 1992).* Second, while Plaintiffs argue that the deeming provision was actually intended to eliminate the possibility of subject matter jurisdiction in cases between a citizen and an alien living in the same state, *Saadeh v. Farouki, 323 U.S. App. D.C. 239, 107 F.3d 52, 60 (D.C. Cir. 1997),* they cannot escape the Eleventh Circuit's command that district courts only "refer to an alien litigant's official immigration status to determine if the alien was 'admitted to the United States for

permanent residence.'" *Foy v. Schantz, Schatzman & Aaronson, P.A., 108 F.3d 1347, 1349 (11th Cir. 1997).* Further, the fact that the Plaintiffs are political asylees that have permanent residency applications pending is of no moment in the inquiry for diversity jurisdiction. *Aideyan v. Greaves, 908 F. Supp. 196, 197 (S.D.N.Y. 1995)* (holding that political asylee is not person admitted to United States for permanent residence within the meaning of *Section 1332(a)*); *see also Chan v. Mui, 1993 U.S. Dist. LEXIS 14693, 1993 WL 427114, at * 1 (S.D.N.Y. Oct. 20, 1993)* (deeming provision does not apply to alien with pending green card application).

Plaintiffs do not provide any allegation of permission from the relevant authorities to remain permanently in the United States. Moreover, the Court also notes that Plaintiffs' Asylum Approvals attached as exhibits expressly state that "asylum status does not give you the right to remain permanently in the United States." Pl. Ex. I. Accordingly, because complete diversity does not exist, the Court is not vested with subject matter jurisdiction over the remaining state law claims in the Complaint. n10

2. Supplemental Jurisdiction (*28 U.S.C. § 1367*)

The Court has concluded that subject matter jurisdiction to consider Plaintiffs' ATCA, TVPA, and RICO claims and further, that diversity jurisdiction under *28 U.S.C. 1332* is not present. When all of the principal federal claims over which the Court may have had original jurisdiction have been dismissed, the decision whether to exercise supplemental jurisdiction over pendent non-federal claims is fully discretionary. *28 U.S.C. § 1367(c)(3).* In *United Mine Workers of America v. Gibbs, 383 U.S. 715, 16 L. Ed. 2d 218, 86 S.*

Ct. 1130 (1966), the Supreme Court advised that "if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well." *Id. at 726*. Here, the proceedings are at an early state and there has been relatively no discovery. Therefore, in the exercise of its discretion, the Court declines to consider the pendent non-federal claims.

IV. CONCLUSION

THIS CAUSE came before the Court upon Defendants' Consolidated Motion to Dismiss Third Amended Complaint for Lack of Subject Matter Jurisdiction and for Failure to State Claim Upon Which Relief Can Be Granted (D.E. No. 87), filed on **April 30, 2003.**

THE COURT has considered the motion, the responses, the supplemental briefs on international legal issues, affidavits, and the pertinent portions of the record, and being otherwise fully advised in the premises and in open court, it is

ADJUDGED that the motion to dismiss is GRANTED. Accordingly, the Plaintiffs' Third Amended Complaint is DISMISSED without prejudice consistent with the above opinion Plaintiffs shall file an amended complaint no later than **January 15, 2004.**

DONE AND ORDERED in Chambers at Miami, Florida, this 12th day of December, 2003.

FEDERICO A. MORENO

UNITED STATES DISTRICT JUDGE

Footnotes

n1 The Third Amended Complaint alleges that Del Monte provided $ 50,000 in monetary assistance to help cover the costs of relocating five of the Plaintiffs in response to pressure from the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco, and Allied Workers' Associations ("IUF"). Apparently, two of the leaders of the armed gang, who had assumed management positions in Del Monte-controlled operations were removed, also in response to IUF pressure.

n2 In the Order of Clarification, dated **February 7, 2003,** the Court ruled that the motions to dismiss filed in response to the Second Amended Complaint have been converted to the Third Amended Complaint.

n3 Whatever wisdom there is in Judge Randolph's concurring opinion in *Al Odah v. United States, 355 U.S. App. D.C. 189, 321 F.3d 1134, 1145-50 (D.C. Cir. 2003)* (Randolph, J. concurring), this Court is bound by the 11th Circuit's decision in *Abebe-Jira v. Negewo, 72 F.3d at 848.* If the 11th Circuit, sitting *en banc,* wishes to adopt Judge Randolph's analysis of the statute it is free to do so within the confines of the Circuit rules to reverse its prior decision. But this Court cannot.

n4 The parties dispute whether notice pleading standards should apply to their allegations regarding other non-jurisdictional issues. Plaintiffs continually claim throughout their briefs that this motion requires no heightened pleading standard outside of the "more searching review" required to establish that a specific violation of international law is identified. *Kadic v. Karadzic, 70 F.3d 232, 238 (2d Cir. 1995).*

n5 Plaintiffs have raised a claim at oral argument that Defendants' conduct violates the international prohibition against cruel, inhuman, or degrading treatment. *See Abebe-Jiri v. Negewo, 1993 U.S. Dist. LEXIS 21158, 1993 WL 814304 (N.D. Ga.), aff'd, 72 F.3d 844 (11th Cir. 1996)*. This claim, however, was not alleged in the TAC. Although Defendants make a strong argument that the facts alleged in the TAC do not rise to the level of a violation of international law, the Court does not reach this issue.

n6 While Plaintiffs allege a claim of kidnapping in the Third Amended Complaint, they do not expressly dispute Defendants' position that kidnapping has coalesced into international law, and instead contend that it is encompassed within the tort of arbitrary detention.

n7 The United States has not ratified these Conventions.

n8 The parties do not dispute that private corporations can be held liable under the ATCA.

n9 The TVPA provides, in relevant part, for a civil cause of action against an individual who, under color of law of any foreign nation, subjects another person to torture or extrajudicial killing. *28 U.S.C. § 1350*, note, § 2(a). Torture is defined as any intentional act inflicting severe pain or suffering taken against an individual in the offender's custody or physical control for the purpose of obtaining information, punishment, or intimidation. *Id.* at § 3(b)(1).

n10 The Court does not reach the issue of the application of Guatemalan or Florida law to the violations alleged in the Third Amended Complaint.

No. 04-10234

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ANGEL ENRIQUE VILLEDA ALDANA, JORGE AUGUSTIN PALMA ROMERO, OSCAR LEONEL GUERRA EVANS, LYIONHEL MCINTOSH RODRIGUEZ, MAREL MARTINEZ, GUMERZINDO LOYO MARTINEZ, RIGOBERTO ALVAYERO HERNANDEZ,
Plaintiffs-Appellants,

versus

DEL MONTE FRESH PRODUCE, N.A., INC., BANDEGUA, Compania De Desarrollo De Guatemala, FRESH DEL MONTE PRODUCE, INC., Defendants-Appellees.

June 23, 2006, Filed

JUDGES: Before EDMONDSON, Chief Judge, TJOFLAT, ANDERSON, BIRCH, DUBINA, BLACK, CARNES, BARKETT, HULL, MARCUS, WILSON, and PRYOR, Circuit Judges. BARKETT, Circuit Judge, Dissenting from the Denial of Rehearing En Banc.

OPINIONBY: J. L. Edmondson

OPINION: ON PETITION FOR REHEARING EN BANC

ORDER:

The Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion of Rehearing En Banc is DENIED.

/s/ J. L. Edmondson

CHIEF JUDGE

DISSENTBY: BARKETT

DISSENT: BARKETT, Circuit Judge, Dissenting from the Denial of Rehearing En Banc:

In concluding that there is no cause of action for a claim of cruel, inhuman, or degrading treatment or punishment under the Alien Tort Claims Act ("ATCA"), 28 U.S.C. § 1350, the panel fails to follow the analysis established by the Supreme Court in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 124 S. Ct. 2739, 159 L. Ed. 2d 718 (2004). Because I believe this creates a "precedent-setting error of exceptional importance" and is "in direct conflict with precedent of the Supreme Court," en banc consideration is warranted and I dissent from the denial of rehearing en banc. See 11th Cir. R. 35-3.

The ATCA grants federal district courts original jurisdiction over any civil action "by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (emphasis added). Sosa held that a cause of action may be recognized under the ATCA if a claim "based on the present-day law of nations . . . rest[s] on a norm of

international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized." *Sosa*, 542 U.S. at 728.

The Court in Sosa directed that ATCA claims "must be gauged against the current state of international law, looking to those sources we have long, albeit cautiously, recognized." *Id.* at 733. It explained that:

[W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.

Id. at 734 (quoting *The Paquete Habana*, 175 U.S. 677, 700, 20 S. Ct. 290, 44 L. Ed. 320 (1900)) (alteration in original). n1 The Court then applied its directive and looked to various international law sources, including binding treaties, customary international norms, and authoritative statements, such as the Restatement (Third) of Foreign Relations Law, to determine whether there was a violation of the "present-day law of nations." *Id.* at 736-37.

The panel, however, failed to follow the analysis set forth in Sosa. n2 When one looks to the sources of international law identified in Sosa -- treaties, judicial

decisions, the practice of governments, and the opinions of international law scholars -- it is clear that there exists a universal, definable, and obligatory prohibition against cruel, inhuman, or degrading treatment or punishment, which is therefore actionable under the ATCA.

First, numerous restatements, declarations, conventions, and treaties find that cruel, inhuman, or degrading treatment or punishment is proscribed by customary international law. See Universal Declaration of Human Rights, art. 5, G.A. Res. 217A(III), U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec.12, 1948) ("[N]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."); International Covenant on Civil and Political Rights ("ICCPR") art. 7, Dec. 19, 1966, 999 U.N.T.S. 171, 175 ("No one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment."); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, pmbl., arts. 1, 16, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 113, 116 ("Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1."); American Convention on Human Rights, art. 5, 1144 U.N.T.S. 123 (entered into force July 18, 1978); Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1, G.A. Res. 3452, U.N. Doc. A/10034 (Dec. 9, 1975) ("Any act of torture or other cruel, inhuman or degrading treatment or punishment is an offense to human dignity[.]"); Restatement (Third)

of the Foreign Relations Law of the United States § 702 (1987) ("A state violates international law if . . . it practices, encourages or condones . . . cruel, inhuman, or degrading treatment").

Second, numerous regional human rights instruments and cases from the International Court of Justice ("ICJ"), European Court of Human Rights ("ECHR"), the Inter-American Commission on Human Rights ("IACHR"), and the African Commission on Human and Peoples' Rights ("ACHPR") also recognize the prohibition of cruel, inhuman, or degrading treatment or punishment. See African Charter on Human and Peoples' Rights, art. 5, June 27, 1981, 21 I.L.M. 58 (1982); European Convention on Human Rights, art. 3, Nov. 4, 1950, E.T.S. no. 005; American Convention on Human Rights, July 18, 1978, 1144 U.N.T.S. 123; Case Concerning Armed Activities on the Territory of the Congo, 2002 I.C.J. 219 (July 10, 2002), 2002 WL 32912050; Media Rights Agenda v. Nigeria, Comm. No. 224/98 (ACHPR 2000), available at www1.umn.edu/humanrts/africa/comcases/224-98.html; Huri-Laws v. Nigeria, Comm. No. 225/98 (ACHPR 2000), available at www1.umn.edu/humanrts/africa/comcases/225-98.html; McKenzie v. Jamaica, Case No. 12.023 (IACHR 2000), available at http://www1.umn.edu/humanrts/cases/76-02-98.html; Valladares v. Ecuador, Case No. 11.778 (IACHR 1998); Congo v. Ecuador, Case No. 11.427 (I.A.C.H.R.1997), available at http://www1.umn.edu/humanrts/cases/1996/ecuador/12-97.htm; Ireland v. United Kingdom, 2 E.H.R.R. 25 (1979); Affidavit of International Law Scholars on the Status of Torture, Cruel, Inhuman or Degrading Treatment, Crimes Against Humanity and Arbitrary

Detention under International Law at 18-29, *Doe I v. Liu Qi*, 349 F. Supp. 2d 1258 (N.D. Cal. 2004), available at
http://www.cja.org/cases/Liuqi_Docs/Liuqi_ILAff.html (illustrating array of acts that courts around the world have found to be cruel, inhuman, or degrading treatment or punishment).

Third, U.S. law and international policy makes abstention from cruel, inhuman, or degrading treatment or punishment an expectation of all states and reinforces such abstention as an explicit global norm. See 7 U.S.C. § 1733(j) (prohibiting agricultural commodities to countries that practice cruel, inhuman, or degrading treatment or punishment); 22 U.S.C. § 262d(a)(1) (stating U.S. policy is to channel international assistance away from countries that practice cruel, inhumane or degrading treatment); 22 U.S.C. § 2151n (prohibiting development assistance to countries that practice cruel, inhuman, or degrading treatment or punishment); 22 U.S.C. § 2304 (prohibiting security assistance to countries that practice cruel, inhuman, or degrading treatment or punishment).

Fourth, numerous U.S. courts have concluded that the prohibition against cruel, inhuman, or degrading treatment or punishment is a norm of customary international law. See *De Sanchez v. Banco Central de Nicar.*, 770 F.2d 1385, 1397 (5th Cir. 1985) (recognizing a "right not to be . . . subjected to cruel, inhuman or degrading punishment" as incorporated into international law); *Doe I v. Liu* Qi, 349 F. Supp. 2d 1258 (N.D. Cal. 2004) (post-Sosa decision stating that cruel, inhuman, or degrading treatment or punishment has been condemned by numerous sources of international

law and holding that conduct sufficiently egregious may be found to constitute cruel, inhuman, or degrading treatment or punishment under the *ATCA); Tachiona v. Mugabe*, 234 F. Supp. 2d 401, 437 (S.D.N.Y. 2002) ("That it may present difficulties to pinpoint precisely where on the spectrum of atrocities the shades of cruel, inhuman, or degrading treatment bleed into torture should not detract from what really goes to the essence of any uncertainty: that, distinctly classified or not, the infliction of cruel, inhuman or degrading treatment by agents of the state, as closely akin to or adjunct of torture, is universally condemned and renounced as offending internationally recognized norms of civilized conduct."); *Wiwa v. Royal Dutch Petroleum Co.*, 2002 U.S. Dist. LEXIS 3293, No. 96 Civ. 8386 (KMW), 2002 WL 319887, at *8 (S.D.N.Y. Feb. 28, 2002) (holding cruel, inhuman, or degrading treatment or punishment actionable under ATCA); *Jama v. I.N.S.*, 22 F. Supp. 2d 353, 363 (D.N.J. 1998) ("American Courts have recognized that the right to be free from cruel, unhuman or degrading treatment is a universally accepted customary human rights norm."); *Xuncax v. Gramajo*, 886 F. Supp. 162, 186 (D. Mass. 1995) (holding that "[t]he international prohibition against [cruel, inhuman, or degrading treatment or punishment] appears to be no less universal than the proscriptions of official torture"); *Paul v. Avril*, 812 F. Supp. 207 (S.D. Fla. 1993) (entering default judgment against former Haitian military ruler on behalf of six alien plaintiffs for ATCA claims of cruel, inhuman, or degrading treatment or punishment).

Finally, this Court in *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996), affirmed a district court order holding that cruel, inhuman, or degrading treatment or

punishment is actionable under the ATCA as a violation of international law. n3 In doing so, the Court affirmed the trial court's judgment, which clearly stated:

The evidence also establishes that each of the plaintiffs was subjected to cruel, inhuman and degrading treatment or punishment. The prohibition against such treatment is found in all of the major international human rights treaties, including the International Covenant on Civil and Political Rights ratified by the United States in September 1992 and the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment. In October 1990 the Senate gave its advice and consent to this Convention with the reservation that the United States considers itself bound by Article 16 of the Convention regarding cruel, inhuman and degrading treatment or punishment to the extent that this term has the same meaning as the kind of cruel and unusual treatment or punishment prohibited by the Fifth, Eighth or Fourteenth Amendment of the United States Constitution. See S. Exec. Report (Sen.) 101-30 101st Cong., 2d Sess., Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (1990).

Abebe-Jiri v. Negewo, 1993 U.S. Dist. LEXIS 21158, No. 90-CV-2010, 1993 WL 814304, at *4 (N.D. Ga. Aug.20, 1993). Indeed, this Court in Abebe-Jira essentially anticipated the analysis in Sosa, in the sense that the test it applied comports with the test dictated in Sosa. *Abebe-Jira*, 72 F.3d at 846-48 (applying an analysis similar to that applied in *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980), and explicitly approved by *Sosa*, 542 U.S. at 731). These sources all

indicate that cruel, inhuman, or degrading treatment or punishment satisfies the "norm of international character" requirement of Sosa. See *Sosa*, 542 U.S. at 725.

I also note that the panel disregarded the specific content requirement set forth in Sosa. See *Sosa*, 542 U.S. at 732 (holding that once it has been established that the norm at issue is one "of international character accepted by the civilized world," our mandate is to determine whether that norm is of as "definite" a content, and as accepted "among civilized nations [as] the historical paradigms" of the 1790s). The Court in Sosa based the specific content requirement on *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 5 L. Ed. 57 (1820), which mandates a determination of whether "the crime is defined by the law of nations with reasonable certainty," through the consultation of "the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing the law." *Id.* at 160-61. Had the panel followed the required Sosa analysis, it would have seen that the specific content requirement of Sosa is not one of categorical specificity -- it does not require defining every possible instance of cruel, inhuman, or degrading treatment or punishment, but rather compels a determination of whether the facts alleged in a particular situation sit within the universal prohibition against cruel, inhuman, or degrading treatment or punishment. *Sosa*, 542 U.S. at 735-36 (avoiding the larger question of whether a plaintiff could ever bring a claim of arbitrary detention under the ATCA, and settling instead on the narrower issue of whether the plaintiff in that case had alleged events that could support a claim under the ATCA). I cannot

see how the facts alleged here -- for example, repeated threats that plaintiffs would be killed by cruel means -- do not meet the prevailing definitions of cruel, inhuman, or degrading treatment or punishment. n4

Thus, I believe this case warrants rehearing and is entitled to en banc review.

Footnotes

n1 Cruel, inhuman, or degrading treatment or punishment is defined as acts which inflict mental or physical suffering, anguish, humiliation, fear and debasement, which fall short of torture. See Convention Against Torture and Other Cruel Inhuman, or Degrading Treatment or Punishment, S. Exec. Rep. 101-30, 2d Sess. 13 (1990). "The difference between torture and cruel, inhuman, or degrading treatment or punishment 'derives principally from a difference in the intensity of the suffering inflicted.'" Restatement (Third) of Foreign Relations Law § 702 (citing Ireland v. United Kingdom, 25 Pub. Eur. Ct. Hum. Rts., ser. A. para. 167 (1978)).

n2 The panel's Sosa analysis with regard to the claims of cruel, inhuman, or degrading treatment or punishment consists solely of noting that "Sosa explains that the International Covenant [on Civil and Political Rights] did not 'create obligations enforceable in the federal courts.'" *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1246-47 (11th Cir. 2005) (per curiam) (quoting *Sosa*, 542 U.S. at 735. This is clearly an insufficient analysis for determining whether there was a violation of the "present-day law of nations" under Sosa. See *Sosa*, 542 U.S. at 736-37.

n3 I note that Abebe-Jira, binding precedent in the Circuit, was neither mentioned nor cited by the panel in its discussion of cruel, inhuman, or degrading treatment or punishment.

n4 Indeed, these facts would meet even the restrictive definition of cruel, inhuman, or degrading treatment or punishment adopted by the United States Senate, which recognized "cruel, inhuman and degrading treatment or punishment only insofar as the term 'cruel, unusual and inhumane treatment or punishment' means the cruel, inhuman or degrading treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States." U.S. Reservations, Declarations, and Understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Cong. Rec. S17486-01 (daily ed., Oct. 27, 1990). Furthermore, it is clear that the acts alleged in this case meet the definitions of cruel, inhuman, and degrading treatment in international treaties, regional and international tribunals, and the writings of prominent jurists, which is the analysis that Sosa requires us to perform. *Sosa*, 542 U.S. at 732 (citing *Smith*, 18 U.S. (5 Wheat.) 153, 5 L. Ed. 57); see, e.g., U.N. Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, Principle 6, G.A. Res. 43/173, 43 U.N. GAOR Supp. (No. 49) at 298, U.N. Doc. A/43/49 (1988) ("[T]he term 'cruel, inhuman or degrading treatment or punishment' should be interpreted so as to extend the widest possible protection against abuses, whether physical or mental, including the holding of a detained or imprisoned person in conditions which deprive him, temporarily or permanently of the use of any of his

natural senses, such as sight or hearing, or of his awareness of place and the passing of time."); Affidavit of International Law Scholars on the Status of Torture, Cruel, Inhuman or Degrading Treatment, Crimes Against Humanity and Arbitrary Detention under International Law at 18, *Doe I v. Liu Qi*, 349 F. Supp. 2d 1258 (N.D. Cal. 2004), available at http://www.cja.org/cases/Liuqi_Docs/Liuqi_ILAff.html (noting that "[t]here is a close relationship between torture and cruel, inhuman or degrading treatment or punishment. The difference between these two violations of international law can be measured by the severity of the act and the degree of suffering").

International Legal Materials
Treaties and Agreements
September, 1984

UNITED NATIONS: DRAFT CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

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**1027* Reproduced from U.N. Document E/CN.4/1984/72, Annex, of March 9, 1984. On the recommendation of the Commission on Human Rights, the Economic and Social Council authorized a meeting of a working group to complete the draft prior to the fortieth session of the Commission on Human Rights. The text reproduced herein is the product of that Working Group. Bracketed provisions were not agreed upon. The Commission, at its fortieth session, decided to transmit to the General Assembly, the text together with the report and summary record of the Commission's debate, and requested the U.N. Secretary-General to invite comments from the member states and to submit those comments as well. The draft will be before the thirty-ninth session of the General Assembly.

The States Parties to this Convention, Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that those rights derive from the inherent dignity of the human person,
Considering the obligation of States under the Charter, in particular Article 55, to promote universal respect for, and observant of, human rights and fundamental freedoms,
Having regard to article 5 of the Universal Declaration of Human Rights and article 7 of the International Covenant on Civil and Political Rights, both of which provide that no one may be subjected to torture or to cruel, inhuman or degrading treatment or punishment,
Having regard also to the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly on 9 December 1975 (resolution 3452 (XXX)),
Desiring to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world,

Have agreed as follows:

Part I

Article 1

1. For the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession. punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering

is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.
*1028 2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

Article 2

1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.
2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.
3. An order from a superior officer or a public authority may not be invoked as a justification of torture.

Article 3

1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

Article 4

1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.
2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.

Article 5

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases:
(a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;
(b) When the alleged offender is a national of that State;
(c) When the victim is a national of that State if that State considers it appropriate.
2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph 1 of this article.
3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.

**1029* Article 6

1. Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State Party in whose territory a person

alleged to have committed any offence referred to in article 4 is present, shall take him into custody or take other legal measures to ensure his presence. The custody and other legal measures shall be as provided in the law of that State but may be continued only for such time as is necessary to enable any criminal or extradition proceedings to be instituted.
2. Such State shall immediately make a preliminary inquiry into the facts.
3. Any person in custody pursuant to paragraph 1 of this article shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national, or, if he is a stateless person, to the representative of the State where he usually resides.
4. When a State, pursuant to this article, has taken a person into custody, it shall immediately notify the States referred to in article 5, paragraph 1, of the fact that such person is in custody and of the circumstances which warrant his detention. The State which makes the preliminary inquiry contemplated in paragraph 2 of this article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.

Article 7

1. The State Party in territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found, shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.
2. These authorities shall take their decision in the same manner as in the case of any ordinary offence of a

serious nature under the law of that State. In the cases referred to in article 5, paragraph 2, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in article 5, paragraph 1.
3. Any person regarding whom proceedings are brought in connection with any of the offences referred to in article 4 shall be guaranteed fair treatment at all stages of the proceedings.

Article 8

1. The offences referred to in article 4 shall be deemed to be included as extraditable offences in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.
2. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention as the legal basis for extradition in respect of such offences. Extradition shall be subject to the other conditions provided by the law of the requested State.
3. States Parties which do not make extradition conditional on the existence of a treaty shall recognize such offences as extraditable offences between themselves subject to the conditions provided by the law of the requested State.
*1030 4. Such offences shall be treated, for the purpose of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in the territories of the States

required to establish their jurisdiction in accordance with article 5, paragraph 1.

Article 9

1. States Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of any of the offences referred to in article 4, including the supply of all evidence at their disposal necessary for the proceedings.
2. States Parties shall carry out their obligations under paragraph 1 of this article in conformity with any treaties on mutual judicial assistance that may exist between them.

Article 10

1. Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.
2. Each State Party shall include this prohibition in the rules or instructions issued in regard to the duties and functions of any such persons.

Article 11

Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment

of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.

Article 12

Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.

Article 13

Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to and to have his case promptly and impartially examined by its competent authorities. Steps shall be taken to ensure that the complainant and withesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.

Article 14

1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.

*1031 2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.

Article 15

Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.

Article 16

1. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture or references to other forms of cruel, inhuman or degrading treatment or punishment.
2. The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibit cruel, inhuman or degrading treatment or punishment or which relate to extradition or expulsion.

Part II

Article 17

1. There shall be established a Committee against Torture (hereinafter referred to as the Committee) which shall carry out the functions hereinafter provided. The Committee shall consist of 10 experts of

high moral standing and recognized competence in the field of human rights, who shall serve in their personal capacity. The experts shall be elected by the States Parties, consideration being given to equitable geographical distribution and to the usefulness of the participation of some persons having legal experience.

2. The members of the Committee shall be elected by secret ballot from a list of persons nominated by States Parties. Each State Party may nominate one person from among its own nationals. States Parties shall bear in mind the usefulness of nominating persons who are also members of the Human Rights Committee established under the International Covenant on Civil and Political Rights and are willing to serve on the Committee against Torture.

3. Elections of the members of the Committee shall be held at biennial meetings of States Parties convened by the Secretary-General of the United Nations. At those meetings, for which two thirds of the States Parties shall constitute a quorum, the persons elected to the Committee shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

4. The initial election shall be held no later than six months after the date of the entry into force of this Convention. At least four months before the date of each election, the Secretary-General of the United Nations shall address a letter to the States Parties inviting them to submit their nominations within three months. The Secretary-General shall prepare a list in alphabetical order of all persons thus *1032 nominated, indicating the States Parties which have nominated them, and shall submit it to the States Parties.

5. The members of the Committee shall be elected for a

term of four years. They shall be eligible for re-election if renominated. However, the term of five of the members elected at the first election shall expire at the end of two years, immediately after the first election the names of these five members shall be chosen by lot by the chairman of the meeting referred to in paragraph 3.

6. If a member of the Committee dies or resigns or for any other cause can no longer perform his Committee duties, the State Party which nominated him shall appoint another expert from among its nationals to serve for the remainder of his term, subject to the approval of the majority of the States Parties. The approval shall be considered given unless half or more of the States Parties respond negatively within six weeks after having been informed by the Secretary-General of the United Nations of the proposed appointment.

7. States Parties shall be responsible for the expenses of the members of the Committee while they are in performance of Committee duties.

Article 18

1. The Committee shall elect its officers for a term of two years. They may be re-elected.

2. The Committee shall establish its own rules of procedure, but these rules shall provide, inter alia, that:

(a) Six members shall constitute a quorum;

(b) Decisions of the Committee shall be made by a majority vote of the members present.

3. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under this Convention.

4. The Secretary-General of the United Nations shall convene the initial meeting of the Committee. After its initial meeting, the Committee shall meet at such times as shall be provided in its rules of procedure.
5. The State Parties shall be responsible for expenses incurred in connection with the holding of meetings of the States Parties and of the Committee, including reimbursement to the United Nations for any expenses, such as the cost of staff and facilities, incurred by the United Nations pursuant to paragraph 3 above.

Article 19

1. The States Parties shall submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have taken to give effect to their undertakings under this Convention, within one year after the entry into force of this Convention for the State Party concerned. Thereafter the States Parties shall submit supplementary reports every four years on any new measures taken, and such other reports as the Committee may request.
2. The Secretary-General shall transmit the reports to all States Parties.
*1033 [3. Each report shall be considered by the Committee which may make such comments or suggestions on the report as it may consider appropriate, and shall forward these to the State Party concerned. That State Party may respond with any observations it chooses to the Committee.
4. The Committee may, at its discretion, decide to include any comments or suggestions made by it in accordance with paragraph 3, together with the observations thereon received from the State Party concerned, in its annual report made in accordance with

article 24. If so requested by the State Party concerned, the Committee may also include a copy of the report submitted under paragraph 1.]

Article 20

[1. If the Committee receives information which appears to it to contain reliable indications that torture is being systematically practised in the territory of a State Party, the Committee shall invite that State Party to submit observations with regard to the information concerned.
2. Taking into account any observations which may have been submitted by the State Party concerned as well as any other relevant information available to it, the Committee may, if it decides that this is warranted, designate one or more of its members to make a confidential inquiry and to report to the Committee urgently.
3. If an inquiry is made in accordance with paragraph 2, the Committee shall seek the co-operation of the State Party concerned. In agreement with that State Party, such an inquiry may include a visit to its territory.
4. After examining the findings of its member or members submitted in accordance with paragraph 2, the Committee shall transmit these findings to the State Party concerned together with any comments or suggestions which seem appropriate in view of the situation.
5. All the proceedings of the Committee referred to in paragraphs 1-4 shall be confidential. After such proocedings have been completed with regard to an inquiry made in accordance with paragraph 2, the Committee may, at its discretion, decide to include a

summary account of the results of the proceedings in its annual report made in accordance with article 24.]

Article 21

1. A State Party to this Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under this Convention. Such communications may be received and considered according to the procedures laid down in this article only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be dealt with by the Committee under this article if it concerns a State Party which has not made such a declaration. Communications received under this article shall be dealt with in accordance with the following procedure:
(a) If a State Party considers that another State Party is not giving effect to the provisions of this Convention, it may, by written communication, bring the matter to the attention of that State Party. Within three months after the receipt of the communication the receiving State shall afford the State which sent the communication an explanation or any other statement in writing clarifying the *1034 matter which should include, to the extent possible and pertinent, reference to domestic procedures and remedies taken, pending, or available in the matter.
(b) If the matter is not adjusted to the satisfaction of both States Parties concerned within six months after the receipt by the receiving State of the initial communication, either State shall have the right to

refer the matter to the Committee, by notice given to the Committee and to the other State.
(c) The Committee shall deal with a matter referred to it under this article only after it has ascertained that all domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged or is unlikely to bring effective relief to the person who is the victim of the violation of this Convention.
(d) The Committee shall hold closed meetings when examining communications under this article.
(e) Subject to the provisions of subparagraph (c), the Committee shall make available its good offices to the States Parties concerned with a view to a friendly solution of the matter on the basis of respect for the obligations provided for in the present Convention. For this purpose, the Committee may, when appropriate, set up an ad hoc conciliation commission.
(f) In any matter referred to it under this article, the Committee may call upon the States Parties concerned, referred to in subparagraph (b), to supply any relevant information.
(g) The States Parties concerned, referred to in subparagraph (b), shall have the right to be represented when the matter is being considered by the Committee and to make submissions orally and/or in writing.
(h) The Committee shall, within 12 months after the date of receipt of notice under subparagraph (b), submit a report.
(i) If a solution within the terms of subparagraph (e) is reached, the Committee shall confine its report to a brief statement of the facts and of the solution reached.

(ii) If a solution within the terms of subparagraph (e) is not reached, the Committee shall confine its report to a brief statement of the facts; the written submissions and record of the oral submissions made by the States Parties concerned shall be attached to the report. In every matter, the report shall be communicated to the States Parties concerned.

2. The provisions of this article shall come into force when five States Parties to this Convention have made declarations under paragraph 1 of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawl shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by any State Party shall be received under this article after the notification of withdrawal of the declaration has been received by the Secrtary-General, unless the State Party concerned has made a new declaration.

**1035* Article 22

1. A State Party to this Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention. No communication shall be received by the Committee if it concerns a State Party to the Convention which has not made such a declaration.

2. The Committee shall consider inadmissible any communication under this article which is anonymous, or which it considers to be an abuse of the right of submission of such communications or to be incompatible with the provisions of this Convention.
3. Subject to the provisions of paragraph 2, the Committee shall bring any communications submitted to it under this article to the attention of the State Party to this Convention which has made a declaration under paragraph 1 and is alleged to be violating any provisions of the Convention. Within six months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.
4. The Committee shall consider communications received under this article in the light of all information made available to it by or on behalf of the individual and by the State Party concerned.
5. The Committee shall not consider any communications from an individual under this article unless it has ascertained that:
(a) The same matter has not been, and is not being, examined under another procedure of international investigation or settlement;
(b) The individual has exhausted all available domestic remedies; this shall not be the rule where the application of the remedies is unreasonably prolonged or is unlikely to bring effective relief to the person who is the victim of the violation of this Convention.
6. The Committee shall hold closed meetings when examining communications under this article.
7. The Committee shall forward its views to the State Party concerned and to the individual.
8. The provisions of this article shall come into force

when five States Parties to this Convention have made declarations under paragraph 1 of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this article; no further communication by or on behalf of an individual shall be received under this article after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party concerned has made a new declaration.

Article 23

The members of the Committee, and of the ad hoc conciliation commissions which may be appointed under article 21, paragraph 1 (e), shall be entitled to the facilities, privileges and immunities of experts on mission for the *1036 United Nations as laid down in the relevant sections of the Convention on the Privileges and Immunities of the United Nations.

Article 24

The Committee shall submit an annual report on its activities under this Convention to the States Parties and to the General Assembly of the United Nations.

Part III

Article 25

1. This Convention is open for signature by all States.
2. This Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 26

This Convention is open to accession by all States. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article 27

1. This Convention shall enter into force on the thirtieth day after the date of the deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.
2. For each State ratifying this Convention or acceding to it after the deposit of the twentieth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after the date of the deposit of its own instrument of ratification or accession.

Article 28

1. Any State Party to this Convention may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to the States Parties to this Convention with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposal. In the event that within four months from the date of such communication at least

one third of the State Parties favours such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted by the Secretary-General to all the States Parties for acceptance.

2. An amendment adopted in accordance with paragraph 1 shall enter into force when two thirds of the States Parties to this Convention have notified the Secretary-General of the United Nations that they have accepted it in accordance with their respective constitutional processes.

3. When amendments enter into force, they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of this Convention and any earlier amendments which they have accepted.

Article 29

1. Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation, **1087* shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

2. Each State may at the time of signature or ratification of this Convention or accession thereto, declare that it does not consider itself bound by the preceding paragraph. The other States Parties shall not

be bound by the preceding paragraph with respect to any State Party having made such a reservation.
3. Any State Party having made a reservation in accordance with the preceding paragraph may at any time withdraw this reservation by notification to the Secretary-General of the United Nations.

Article 30

1. A State Party may denounce this Convention by written notification to the Secretary-General of the United Nations. Denunciation becomes effective one year after the date of receipt of the notification by the Secretary-General.
2. Such a denunciation shall not have the effect of releasing the State Party from its obligations under this Convention in regard to any act or omission which occurs prior to the date at which the denunciation becomes effective. Nor shall denunciation prejudice in any way the continued consideration of any matter which is already under consideration by the Committee prior to the date at which the denunciation becomes effective.
3. Following the date at which the denunciation of a State Party becomes effective, the Committee shall not commence consideration of any new matter regarding that State.

Article 31

The Secretary-General of the United Nations shall inform all members of the United Nations and all States which have signed this Convention or acceded to it, of the following particulars:
(a) Signatures, ratifications and accessions under

articles 25 and 26;
(b) The date of entry into force of this Convention under article 27, and the date of the entry into force of any amendments under article 28;
(c) Denunciations under article 30.

Article 32

1. This Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.
2. The Secretary-General of the United Nations shall transmit certified copies of this Convention to all States.

23 I.L.M. 1027 (1984)

END OF DOCUMENT

U.S. reservations, declarations, and understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Cong. Rec. S17486-01 (daily ed., Oct. 27, 1990).

I. The Senate's advice and consent is subject to the following reservations:

(1) That the United States considers itself bound by the obligation under Article 16 to prevent "cruel, inhuman or degrading treatment or punishment," only insofar as the term "cruel, inhuman or degrading treatment or punishment" means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.

(2) That pursuant to Article 30(2) the United States declares that it does not consider itself bound by Article 30(1), but reserves the right specifically to agree to follow this or any other procedure for arbitration in a particular case.

II. The Senate's advice and consent is subject to the following understandings, which shall apply to the obligations of the United States under this Convention:
(1)(a) That with reference to Article 1, the United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from: (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or

threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

(b) That the United States understands that the definition of torture in Article 1 is intended to apply only to acts directed against persons in the offender's custody or physical control.

(c) That with reference to Article 1 of the Convention, the United States understands that "sanctions" includes judicially imposed sanctions and other enforcement actions authorized by United States law or by judicial interpretation of such law. Nonetheless, the United States understands that a State Party could not through its domestic sanctions defeat the object and purpose of the Convention to prohibit torture.

(d) That with reference to Article 1 of the Convention, the United States understands that the term "acquiescence" requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his legal responsibility to intervene to prevent such activity.

(e) That with reference to Article 1 of the Convention, the United States understands that noncompliance with applicable legal procedural standards does not *per se* constitute torture.

(2) That the United States understands the phrase, "where there are substantial grounds for believing that he would be in danger of being subjected to torture," as used in Article 3 of the Convention, to mean "if it is more likely than not that he would be tortured."

(3) That it is the understanding of the United States that Article 14 requires a State Party to provide a private right of action for damages only for acts of torture committed in territory under the jurisdiction of that State Party.

(4) That the United States understands that international law does not prohibit the death penalty, and does not consider this Convention to restrict or prohibit the United States from applying the death penalty consistent with the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States, including any constitutional period of confinement prior to the imposition of the death penalty.

(5) That the United States understands that this Convention shall be implemented by the United States Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered by the Convention and otherwise by the state and local governments. Accordingly, in implementing Articles 10-14 and 16, the United States Government shall take measures appropriate to the Federal system to the end that the competent authorities of the constituent units of the United States of America may take appropriate measures for the fulfillment of the Convention.

III. The Senate's advice and consent is subject to the following declarations:

(1) That the United States declares that the provisions of Articles 1 through 16 of the Convention are not self-executing.

(2) That the United States declares, pursuant to Article 21, paragraph 1, of the Convention, that it recognizes the competence of the Committee against Torture to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the Convention. It is the understanding of the United States that, pursuant to the above mentioned article, such communications shall be accepted and processed only if they come from a State Party which has made a similar declaration.

IV. The Senate's advice and consent is subject to the following proviso, which shall not be included in the instrument of ratification to be deposited by the President:

The President of the United States shall not deposit the instrument of ratification until such time as he has notified all present and prospective ratifying parties to this Convention that nothing in this Convention requires or authorizes legislation, or other action, by the United States of America prohibited by the Constitution of the United States as interpreted by the United States